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IN THE

Supreme Court Of The United States

October Term, 1986

DOUGLASS B. WHITNEY, M.D.,
W. D. JORDAN, M.D., and
FRED SHESSEL, M.D. - - - - Petitioners

versus

MARGARET HECKLER, Secretary of the Department of Health and Human Services - - - - - - - - Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

QUESTIONS PRESENTED

The following questions are presented for review:

1. Whether Section 2306(c) of the "Deficit Reduction Act of 1984", amending Section 1842(h) and (j)(1) and (2) of the Social Security Act, codified at 42 U.S.C. Section 1395u(h) and (j)(1) and (2), as extended by subsequent amendments, which freezes at 1983 levels the total amount of fees for health care services the Petitioners, as "non-participating" physicians, may charge Medicare beneficiaries — amounts the federal government does not pay — deprives Petitioners of property without due process of law in violation of the Fifth Amendment to the Constitution of the United States?

2. Whether Section 2306(c) of the "Deficit Reduction Act of 1984", amending Section 1842 (h), (i) and (j) of the Social Security Act, codified at 42 U.S.C. Section 1395u(h), (i) and (j), which permits the Respondent Secretary to establish toll-free telephone numbers and directories and advise Medicare beneficiaries to utilize only the health care services of "participating" physicians, and to sanction "non-participating" physicians for raising their fees is an unlawful bill of attainder in violation of Article I, Section 9, Clause 3, of the Constitution of the United States?

PARTIES TO THE PROCEEDING

All of the parties to the proceeding in the Court whose judgment is sought to be reviewed are named in the caption of this Petition as filed in this Court.

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IN THE

Supreme Court Of The United States

October Term, 1986

No._____

DOUGLASS B. WHITNEY, M.D.,
W. D. JORDAN, M.D., and
FRED SHESSEL, M.D. - - - - - - *Petitioners*

v.

MARGARET HECKLER, Secretary of the Department of Health and Human Services - - - - - - - - *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The Petitioners, DOUGLASS B. WHITNEY, W. D. JORDAN, and FRED SHESSEL, respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit, entered in this matter on January 22, 1986. The Petition is filed within ninety (90) days of the order entered herein.

OPINIONS BELOW

The Opinion of the United States District Court for the Northern District of Georgia, dated February 4, 1985, and the Opinion of the United States Court of Appeals for the Eleventh Circuit, entered January 22, 1986, are reprinted in the separate Appendix of this Petition, pages 1a through 44a. The Opinion and Judgment of the United States District Court for the Northern District of Georgia is reported at 603 F. Supp. 821. The Opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 780 F. 2d 963.

JURISDICTION

The Judgment of the United States Court of Appeals for the Eleventh Circuit affirming the judgment of the United States District Court for the Northern District of Georgia was entered January 22, 1986, and issued as mandate on February 20, 1986. The jurisdiction of this Honorable Court is invoked pursuant to 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Petitioners assert that by the United States Court of Appeals for the Eleventh Circuit upholding the constitutionality of Section 2306(c) of the "Deficit Reduction Act of 1984", amending Section 1842(h), (i) and (j) of the Social Security Act, 42 U.S.C. Section 1395u(h), (i) and (j), Petitioners have been denied property without due process of law; their private property has been taken without just compensation; and they are the subjects of an unlawful bill of attainder, all contrary to the following provisions of the Constitution of the United States:

Fifth Amendment to the Constitution of the United States:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation.

Article I, Section 9, Paragraph 3 of the Constitution of the United States:

> No Bill of Attainder or ex post facto law shall be passed.

STATEMENT OF THE CASE
HOW THE FEDERAL QUESTIONS ARE PRESENTED

The Federal, constitutional questions involved in the case *sub judice* were first presented in the Petitioner's Verified Complaint for Injunctive Relief and Declaration of Rights filed pursuant to 28 U.S.C. Section 1331, 28 U.S.C. Section 2201 and Rule 57 of the Federal Rules of Civil Procedure, on September 21, 1984, in the United States District Court for the Northern District of Georgia. The aforesaid Verified Complaint for Injunctive Relief and Declaration of Rights stated, *inter alia*, as follows:

8.

> The "Deficit Reduction Act of 1984", originally referred to as H.R. 4170, was passed by the Senate and the House of Representatives, and was signed into law by the President of the United States. The said "Deficit Reduction Act of 1984", the subject of the complaint herein contains two divisions: Division A, Tax Reform Act of 1984; and Division B, The Spending Reduction Act of 1984. Title III of Division B is comprised of Sections 2300 through 2391. Section 2306 is the subject of the complaint herein, and is comprised of subsections (a) through (j) inclusive. The said pertinent provisions are codified at 42 U.S.C. Section 1395u. A true and accurate copy of the said Section 2306 of the "Deficit Reduction Act of 1984", HR 4170, is marked Exhibit "A", attached hereto set out at length herein. Section 2306 of the "Deficit Reduction Act of 1984" became effective July, 1984.

9.

Plaintiffs, Douglass G. Whitney, M.D., W. D. Jordan, M.D., and Fred Shessel, M.D., are required under Section 2306(c) of the "Deficit Reduction Act of 1984", Section 1842(h)(1) of the Social Security Act, 42 U.S.C. Section 1395u(h)(1), to elect whether or not to become participants in the Medicare program before October 1, 1984, and cannot again make such an election for another twelve (12) months.

10.

Plaintiffs, Douglass Whitney, M.D., W. D. Jordan, M.D., and Fred Shessel, M.D., have determined not to voluntarily enter into an agreement with the Defendant Secretary of the Department of Health and Human Services of the United States of America pursuant to Section 2306(c) of the "Deficit Reduction Act of 1984", Section 1842(h)(1) of the Social Security Act, 42 U.S.C. Section 1395u(h)(1), because they believe that participation in Medicare, like the acceptance of assignments in Medicare, interjects the Defendant Secretary and her agents and their regulatory authority so pervasively into the physician-patient relationship that the Plaintiffs' decisions in an atmosphere of freedom is wholly undermined, and thereby the ability of the Plaintiffs to render to their patients medical care of the highest and most proper quality is impaired to the extent that their health care services are rationed to patients.

11.

That Section 2306(c) of the said "Deficit Reduction Act of 1984", Section 1842(j)(1) of the Social Security Act, 42 U.S.C. Section 1395u(j)(1), as of October 1, 1984, freezes and regulates the fees of private, practicing physicians, including the Plaintiffs herein, who elect not to become participants in the Medicare program, and who elect not to contract with or receive monies or compensation in any form from the Medicare program and the Defendant, Margaret Heckler, Secre-

tary of the Department of Health and Human Services of the United States of America.

12.

That Section 2306(c) of the "Deficit Reduction Act of 1984", Section 1842(h) and (i) of the Social Security Act, 42 U.S.C. Section 1395u(h) and (i), as of October 1, 1984, relegates and subjects non-participating physicians, including the Plaintiffs herein, to being singled out publicly as non-preferred and non-recommended physicians, and subjects those patients who are beneficiaries of the Medicare program to being informed that said non-participating physicians, including the Plaintiffs herein, are not preferred and are not recommended by the Defendant Margaret Heckler, Secretary of the Department of Health and Human Services of the United States of America, through said Defendant providing preferred listings of any participating physicians by means of printed directories and telephone communications and other devices and means directed to beneficiaries of the Medicare program.

13.

That Section 2306(c) of the "Deficit Reduction Act of 1984", Section 1842(j)(l) of the Social Security Act, 42 U.S.C. Section 1395u(j)(l), as of October 1, 1984, subjects non-participating physicians, including the Plaintiffs herein, to supervision monitoring and control by the Defendant Margaret Heckler, Secretary of the Department of Health and Human Services of the United States of America, even though said non-participating physicians, including the Plaintiffs herein, elect not to participate in the Medicare program and elect not to contract with or receive monies or compensation in any form from the Medicare program or the Defendant Secretary.

14.

That Section 2306(c)of the said "Deficit Reduction Act of 1984", Section 1842(j)(1) and (2) of the Social

Security Act, 42 U.S.C. Section 1395u(j)(1) and (2), as of October 1, 1984, subjects non-participating physicians, including the Plaintiffs herein to punishment and penalties even more severe than the punishment of participating physicians in the event of a violation of the compensation requirements set forth in Section 2306(c) of the "Deficit Reduction Act of 1984", Section 1842(j)(1) of the Social Security Act, 42 U.S.C. Section 1395u(j)(1).

15.

That Section 2306(c) of the "Deficit Reduction Act of 1984", Section 1842(h) and (j) of the Social Security Act, 42 U.S.C. Section 1395u(h)(i) and (j) aforementioned, are violative of Article I, Section 9, and the Fifth Amendment to the Constitution of the United States.

16.

Plaintiffs, Douglass G. Whitney, M.D., W. D. Jordan, M.D., and Fred Shessel, M.D., are not newly licensed physicians, nor are they the sole physicians in their community, nor are they the sole providers of essential, specialized health care services to a community.

17.

Plaintiffs, Douglass G. Whitney, M.D., W. D. Jordan, M.D., and Fred Shessel, M.D., intend to continue their private medical practices in the Northern District of Georgia, and have, in the past, refused to accept assignments under the Medicare program, and now desire not to participate in the Medicare program because Plaintiffs fear participation in the program will seriously undermine quality patient care. Plaintiffs maintain that Section 2306(c) of the "Deficit Reduction Act of 1984", Section 1842(h), (i) and (j) of the Social Security Act, 42 U.S.C. Section 1395u(h), (i) and (j), is unconstitutional as aforestated insofar as it relates to non-participating physicians, including the Plaintiffs, and, because of the freezing and regulating of

their fees by the Defendant Secretary; the result of which, Plaintiffs believe, will force their services to be rationed, and the quality of the health care services to be impaired, the monitoring and regulating of their practices by the Defendant Secretary; the subjecting of Plaintiffs to adverse commentary and the holding up of Plaintiffs to the public and their patients as non-preferred and non-recommended physicians by the Defendant Secretary; and the subjecting of Plaintiffs to severe penalties; Plaintiffs, and other non-participating physicians, will suffer irreparable harm by not entering into an agreement with the Defendant Secretary to become a participating physician before October 1, 1984. There, accordingly, is no adequate remedy at law.

18.

WHEREFORE, Plaintiff physicians, Douglass G. Whitney, M.D., W. D. Jordan, M.D., and Fred Shessel, M.D., ask:

1. That the Defendant, Margaret Heckler, in her capacity as Secretary of the Department of Health and Human Services for the United States of America, and her successors in office, be preliminarily and permanently enjoined from enforcing, or otherwise implementing, or taking any action pursuant to Section 2306 (c) of the "Deficit Reduction Act of 1984", Section 1842(h), (i) and (j) of the Social Security Act, 42 U.S.C. Section 1395u(h), (i) and (j).

2. That the Court declare Section 2306(c) of the "Deficit Reduction Act of 1984", Section 1842(h), (i) and (j) of the Social Security Act, 42 U.S.C. Section 1395u(h), (i) and (j), unconstitutional and void.

3. That the Court grant such other and further relief as it may determine to be just and appropriate. (R. 3)

It was further plead in the Verified Amendment to the Complaint, amending paragraph 6 of the original Verified Complaint, ordered filed on October 15, 1984, the following:

> The Plaintiffs intend to raise their fees they charge to Medicare patients for medical and surgical services within 15 months subsequent to July 1, 1984. They have elected not to become participants prior to October 1, 1984. Medicare patients represent 50% to 60% of Plaintiffs' respective practices and approximately 85% of those Medicare patients have supplemental health insurance. (R. 202)

Further, the Petitioners and the Respondent entered into a Stipulation on October 15, 1984, which the parties stipulated, *inter alia,* as follows:

> 3. The parties stipulate and agree to present the case on the merits, rather than as a preliminary injunction hearing, as to whether the questioned portions of the Deficit Reduction Act of 1984 are unconstitutional and should be enjoined at the hearing on November 2, 1984. (R. 208; 211) The case was submitted to the trial court on Stipulated Findings of Fact (R. 263).

The United States District Court for the Northern District of Georgia and the United States Court of Appeals for the Eleventh Circuit decided the action on the merits, both courts upholding the constitutionality of Section 2306(c) of the "Deficit Reduction Act of 1984."

FACTUAL BACKGROUND

I. A Discussion of the Amendments to Section 1842 of the Social Security Act Effectuated by the Passage of the "Deficit Reduction Act of 1984".

The "Deficit Reduction Act of 1984", an Act of the Congress of the United States, became effective on July 18, 1984. Beyond amending numerous provisions of the Internal Revenue Code, it amended Section 1842 of the Social Security Act, which Section relates to Medicare.

The pertinent amendments may be catalogued as follows:

Section 2306(c) of the "Deficit Reduction Act of 1984" amended Section 1842 of the Social Security Act to read:

> Any physician or supplier may voluntarily enter into an agreement with the Secretary to become a participating physician or supplier. For purposes of this section, the term "participating physician or supplier" means a physician or supplier (excluding any provider of services) who, before October 1 of the year beginning with 1984, enters into an agreement with the Secretary which provides that such physician or supplier will accept payment under this part on the basis of an assignment described in subsection (b)(3)(B)(ii), in accordance with subsection (b)(6)(B), or under the procedure described in section 1870(f)(1) for all items and services furnished to individuals enrolled under this part during the 12-month period beginning on October 1 of such year. In the case of a newly licensed physician or a physician who begins a practice in a new area, in the case of a new supplier who begins a new business, or in such similar cases as the Secretary may specify, such agreement after October 1 of a year, for items and services furnished during the remainder of the twelve month period beginning on such October 1.

The foregoing amendment appears as Section 1842(h)(1) of the Social Security Act, and is codified at 42 U.S.C. Section 1395u(h)(1). It allows physicians to elect to enter into a contractual relationship with the Respondent Secretary of the United States Department of Health & Human Services for the providing of health care services to beneficiaries of Medicare and become, thereby, "participating" physicians.

Section 2306(c) of the "Deficit Reduction Act of 1984" amended Section 1842 of the Social Security Act to read as follows:

> Each carrier having an agreement with the Secretary under Subsection (a) shall maintain a toll-free telephone number or numbers at which individuals en-

> rolled under this part may obtain the names, addresses, specialty, and telephone numbers of participating physicians and suppliers.

The foregoing section appears as Section 1842(h)(2) of the Social Security Act, and is codified at 42 U.S.C. Section 1395u(h)(2). It creates toll-free telephone access for individual Medicare beneficiaries for the purpose of telephoning the insurance company intermediary and being referred to physicians who are "participating" physicians in their area. The insurance company intermediary is an insurance company under contract with the Respondent Secretary to administer the Medicare program in a given locality.

Section 2306(c) further amended the Social Security Act to read in pertinent part as follows:

> At the beginning of each fiscal year the Secretary shall publish a directory containing the name, address, and specialty of all participating physicians and suppliers (as defined in section (j)(1) for that fiscal year).

The above paragraph amended Section 1842(i)(2) of the Social Security Act, and is codified at 42 U.S.C. Section 1395u(i)(2). Under the amendment, the Respondent Secretary is authorized to publish a list of physicians who are "participating" physicians. The list is made available to the public and to the insurance company intermediaries.

Additionally, under Section 2306(c) of the "Deficit Reduction Act of 1984", the Social Security Act was amended to read as follows:

> In the case of a physician who is not a participating physician, the Secretary shall monitor each such physician's actual charges to individuals enrolled under this part for physician's services furnished during the 15-month period beginning July 1, 1984. If such phy-

> sician knowingly and willfully bills individuals enrolled under this part for actual charges in excess of such physician's actual charges for the calendar quarter beginning on April 1, 1984, the Secretary may apply sanctions against such physician in accordance with paragraph (2).

The foregoing paragraph amended Section 1842(j)(1) of the Social Security Act, and is codified at 42 U.S.C. Section 1395u(j)(1). It provides for the regulation of fees charged to private patients by "non-participating" physicians who do not enter into a contractual relationship with the Respondent Secretary. Importantly, it does not freeze the amount of the fees for which the government would provide reimbursement, *but, rather, freezes that part of the fees for which there is no government reimbursement!* The fees are frozen at profile levels as of the calendar quarter beginning April 1, 1984. Such, of course, means that the fee levels are frozen at 1983 levels since there is an approximate one year lag time in profile updating. It is that part of the freeze which Petitioners have challenged herein.

Section 2306(c) of the "Deficit Reduction Act of 1984" amended Section 1842 of the Social Security Act to read as follows:

> Subject to paragraph (3), the sanctions which the Secretary may apply under paragraph (1) are —
>
> (A) Barring a physician from participating under the program under this title for a period not to exceed 5 years, in accordance with the procedures of paragraphs (2) and (3) of section 1862(d), or,
>
> (B) the imposition of civil monetary penalties and assessment, in the same manner as such penalties and authorized under section 1128A(a), or both.
>
> No payment may be made under this title with respect to any item or service furnished by a physi-

> cian during the period when he is barred from participation in the program under this title pursuant to this subsection.

The foregoing amendment appears in Section 1842(j)(2) of the Social Security Act, and is codified in 42 U.S.C. Section 1395u(j)(2). As amended, the section provides for the imposition of civil monetary penalties on "non-participating" physicians if they raise their fees during the period of time covered by the challenged Act.

Petitioners, Douglass G. Whitney, M.D., W. D. Jordan, M.D., and Fred Shessel, M.D., have never "participated" in the Medicare program. (R. 5; 268). W. D. Jordan has never taken an "assignment" under any circumstances. (R. 72). Douglass G. Whitney, M.D., and Fred Shessel, M.D., have only rarely taken assignments on a case-by-case basis. (R. 72). Neither Dr. Whitney nor Dr. Shessel have taken assignments as a general practice. (R. 72).

Petitioners, Douglass G. Whitney, M.D., W. D. Jordan, M.D., and Fred Shessel, M.D., chose not to "participate" in the Medicare program, and do not intend on "participating" in the program. (R. 9, 72). For all purposes of the "Deficit Reduction Act of 1984", Petitioners have been and now are "non-participating" physicians.

Historically, Petitioners have had to raise their fees on a near yearly basis in order to meet increased operating costs and inflation. Petitioners have expanded their offices and personnel, and, in the case of one of the Petitioners—W. D. Jordan, M.D. — he has opened a new satellite office recently. (R. 73).

II. Congress has Extended the Freeze and the Punitive Aspects of the Challenged Act Against "Non-Participating" Physicians Three Times, and the Freeze is Currently Extended Until December 31, 1986.

Though the lower court referred to the fee freeze in the challenged act as "temporary", the facts illustrate

something quite different. Under the "Emergency Extension Act of 1985", Pub. L. No. 99-107, §5(b), 99 Stat. 479, amended by Pub. L. No. 99-155, §2(d) (November 14, 1985) and Pub. L. No. 99-201, §____ (December 20, 1985), the freeze on the fees of "non-participating" physicians was extended until March 15, 1986. Congress, on March 13, 1986, again extended the fee freeze for "non-participating" physicians until December 31, 1986. See: House Resolution 3128; "Consolidated Omnibus Budget Reconciliation Act of 1985", Pub. L. No. ____ § ____.

As of April 30, 1986 "participating" physicians will get an increase in the fees they receive according to the most recent extension. Those who are "non-participating" physicians will be given an opportunity to become "participating" physicians and will receive an increase in fees. But, those who were "non-participating" physicians and remain such after April 30, 1986—including the Petitioners herein — will continue to have their fees frozen at 1983 levels through the end of the year.

III. How the Amendments to Section 1842 of the Social Security Act, Effectuated by the "Deficit Reduction Act of 1984", Affect Petitioners.

With the enactment of the Medicare Amendments in the "Deficit Reduction Act of 1984", Section 2306(a), the payments Medicare will make for health care services rendered to beneficiaries are frozen. Such a freeze on government obligations to pay for benefits, of course, carries out the purpose of the so-called "deficit reduction". Petitioners have not challenged the federal government's "deficit reduction" set forth in Section 2306(a).

However, Section 2306(c) of the Act freezes what the "non-participating" physicians charge their private patients. *This freeze affects those amounts which the government does not pay.* For Petitioners, fully fifty percent

(50%) to sixty percent (60%) of their practice is and will be affected by the fee freeze. Though the court below asserted that the Petitioners could choose not to perform services for Medicare beneficiaries in order to avoid the effect of the Act, such is neither a legitimate nor reasonable option. The Petitioners were practicing their medical and surgical specialties long before Medicare. They specialize in areas where large numbers of their patients suffer from diseases of aging. To surrender their patients who are elderly would necessitate them surrendering, for all practical purposes, their entire practices. More importantly, as surgeons, Petitioners seldom have the choice of refusing a patient, since so much of their care is performed under emergency circumstances. One does not ask a patient on the emergency room operating table if he or she is a Medicare beneficiary and then refuse the performance of health care services if the answer is affirmative.

Under the challenged Act, Petitioners are being told to freeze that which government does not even pay, or, get out of the medical practice! There is little doubt that the fee freeze is not based upon any scientific or technical formula, prepared after a thorough survey of the health care industry, designed to make the regulation "equitable". The Act, itself, underscores that fact without any further illustration. The Act arbitrarily freezes Petitioners' fees! When Petitioners raise their fees — an act they intend on doing because of the economics of their practice and the general economy — they will be penalized and sanctioned by the Respondent Secretary in accord with the challenged Act. Petitioners may be fined up to Two Thousand Dollars ($2,000) per violation or "banished" from performing services on behalf of Medicare beneficiaries.

Additionally, as aforesaid, the Respondent Secretary has prepared lists and directories of only "participating"

physicians to be disseminated to all Medicare beneficiaries. As well, the Respondent Secretary has established, under the Act, toll-free telephone numbers to disseminate the names of only "participating" physicians to Medicare beneficiaries. According to the Congressional history of the Act, the purpose behind the "inverse blacklisting" is punitive; *e.g.*, to force physicians to "participate", or, freeze their fees if they do not, and lure their patients to "participating" physicians. Consequently, Petitioners' livelihoods are at stake over the implementation of Section 2306(c) of the "Deficit Reduction Act of 1984".

There are essential differences in the application of the freeze for "non-participating" physicians and surgeons and "participating" physicians and surgeons. The "participating" physician or surgeon agrees, in advance, to accept whatever Medicare deems is the "reasonable" and "customary" fee, and he or she agrees to receive, directly from the federal government, up to eighty percent (80%) of that figure. The "participating" physician or surgeon is much like the institutional provider of health care services under Part A of Medicare that agrees to conform to the "conditions of participation" under Medicare in order to receive direct payment from Medicare. The "participating" physician or surgeon agrees to let the government determine the total amount of his or her payment for services performed on behalf of Medicare beneficiaries.

The "non-participating" physician, on the other hand, has no "agreement" with Medicare for payment. The "non-participating" physician or surgeon charges what he or she deems his or her health care services are worth, or, what he or she and the patient agree is fair and reasonable. The patient, should he or she be a Medicare beneficiary, files his or her own claim with the payer, and the patient is *reimbursed* a figure equal to eighty percent (80%) of the

Medicare-determined "reasonable" and "customary" fee for those health care services. The Medicare system, Part B, functions much like the private Blue Cross subscription arrangements.

Under the "Deficit Reduction Act of 1984", Section 2306(a), Section 1842(b) of the Social Security Act, codified at 42 U.S.C. Section 1395u(b), the "prevailing" and "reasonable" charges for which Medicare will reimburse a patient are frozen at levels determined as of fiscal year July 1, 1983. Accordingly, for total *reimbursement* purposes, Congress, under Section 2306(a) of the "Deficit Reduction Act of 1984", has frozen federal expenditures. So, no matter what a "non-participating" physician or surgeon charges, the obligation of the federal government is not affected since the payment is based upon what Medicare determines is "reasonable" and "customary" and that amount is frozen. But, for the "non-participating" physician, Congress, additionally, under Section 2306(c) of the "Deficit Reduction Act of 1984", has frozen his or her *entire* fee at profile levels as of calendar quarter beginning April 1, 1984; even that part of the fee for which government does not reimburse the beneficiary.

To enforce the maximum fee established, the "Deficit Reduction Act of 1984", Section 2306(c), amending Section 1842(j)(2) of the Social Security Act, codified at 42 U.S.C. Section 1395u(j)(2), establishes severe penalties to be exercised against "non-participating" physicians and surgeons who do not conform to the fee freeze. These penalties include civil fines of up to Two Thousand Dollars ($2,000.00) per offense, and, total exclusion from the Medicare system, which, for the patients of the "non-participating" physician or surgeon, would mean that they would not be able to receive reimbursement for that "non-participating" physician's or surgeon's health care services.

REASONS FOR GRANTING THE WRIT

The Court below upheld the constitutionality of Section 2306(c) of the "Deficit Reduction Act of 1984". That holding was in error. Section 2306(c) of the "Deficit Reduction Act of 1984", amending Section 1842(h), (i) and (j) of the Social Security Act, codified at 42 U.S.C. Section 1395u(h), (i) and (j) is violative of Article I, Section 9, Clause 3, and the Fifth Amendment to the Constitution of the United States for the following reasons:

I. Section 2306(c) of the "Deficit Reduction Act of 1984" Constitutes an Unlawful Denial and Taking of Property Without Due Process of Law in Violation of the Fifth Amendment to the Constitution of the United States.

While it is beyond question that Congress has virtual plenary authority in our constitutional jurisprudence to regulate commerce[1] and provide for the general welfare[2], that authority is not *limitless*. No one questions herein the authority of government, state or federal, to set minimum wages, *United States* v. *Darby*, 312 U. S. 100, 61 S. Ct. 451, 86 L. Ed. 609 (1941), *West Coast Hotel* v. *Parrish*, 300 U. S. 379, 57 S. Ct. 578, 81 L. Ed. 703 (1973); to regulate essential industries, *Wickard* v. *Filburn*, 317 U. S. 111, 63 S. Ct. 82, 87 L. Ed. 122 (1942); *Lochner* v. *New York*, 198 U. S. 45, 28 S. Ct. 539, 49 L. Ed. 937 (1905); *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U. S. 381, 60 S. Ct. 907, 84 L. Ed. 1263 (1940); and even to set minimum and maximum prices for goods and services, *Nebbia* v. *New York*, 291 U. S. 502, 54 S. Ct. 505, 78 L. Ed. 940 (1934); *Bluefield Water Works and Improvement Co.* v. *Public Service Comm'n of*

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[1]Constitution of the United States, Article I, Section 8, Clause 1.

[2]Constitution of the United States, Article I, Section 8, Clause 3.

the State of West Virginia, 262 U. S. 679, 43 S. Ct. 675, 67 L. Ed. 1176 (1923); *In re Permian Basin Area Rate Case,* 390 U. S. 747, 88 S. Ct. 1344, 20 L. Ed. 2d 312 (1968). Unquestionably, however, the history of each and every instance of the establishment of wage or price regulation or control has followed a significant pattern; a pattern which provides us with an understanding of the *limits* of that very expansive government power.

Whenever an industry, or, for that matter, the whole national economy, has been brought under wage or price controls, essential protections have always been provided. For example, for the Congress to regulate the price of agricultural commodities — to provide a floor or "support" price — the grower was required to limit the amount of production he would offer for sale.[3] See: *Wickard* v. *Filburn,* 317 U. S. 111, 63 S. Ct. 82, 87 L. Ed. 122 (1942). And, in that instance, the United States Department of Agriculture, through statutorily-created local Agricultural Stabilization and Conservation Committees (ASCS), and under a comprehensive regulatory scheme, provided certain protective devices and appeal mechanisms for the producers who claimed their allotments were insufficient. Where Congress sought to regulate the classification and minimum price of milk by regulation, methods and standards for the equitable determination of price, and hearings with adequate notice thereon, were also provided.[4] See: *United States* v. *Rock Royal Co-Op,* 307 U. S. 533, 59 S. Ct. 993, 83 L. Ed. 1446 (1939). When Congress sought to regulate the price of coal, it established the National Bituminous Coal Commission and the Bituminous Coal Code to survey

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[3]Agricultural Adjustment Act of 1938, 7 U.S.C. Sections 1281 *et seq.*

[4]Agricultural Marketing Agreement Act of 1937, 7 U.S.C. Section 602 *et seq.*

pursuant to established, statutory standards in order to the industry and establish minimum and maximum prices assure the "reasonableness" and equitableness of the prices established.[5] Mr. Justice Douglas, writing the opinion of this Honorable Court that upheld the establishing, by the Bituminous Coal Commission, of maximum prices, set forth the reasons why the rates set were "just and reasonable":

> These maximum prices must be fixed at a uniform increase above minimum prices so that in the aggregate they will yield a reasonable return above the weighted average total cost of the district. And no maximum prices shall be established for any mine which will not yield a fair return on the fair value of the property. The minimum prices to be fixed must conform to the following standards: the weighted average cost for each minimum price area must be computed, the elements of cost being defined; a classification of the various sizes and grades of coal shall be made which reflects as nearly as possible the relative market value of the various kinds, qualities, and sizes of coal, which is just and equitable as between producers within the district and which has due regard to the interests of the consuming public; and coordinated minimum prices shall be established for coal (a) which reflect as nearly as possible the relative market values at points of delivery taking into account specifically enumerated factors, (b) which preserve as nearly as may be existing fair and competitive opportunities, (c) which are just and equitable as between districts, and (d) which, consistently with the process of coordination, yield a return to each area approximated its weighted average cost per ton.

Sunshine Anthracite Coal Co. v. *Adkins*, 310 U. S., at 397.

In the regulation of the rates and charges for natural gas, Congress empowered the Federal Power Commission

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[5]Bituminous Coal Act of 1935, 15 U.S.C. Sections 828 *et seq.*

to investigate and, after hearings, determine "just and reasonable" maximum rates.[6] Wrote Mr. Chief Justice Harlan Fisk Stone,

> The establishment of a rate for a regulated industry often involves two steps of a different character, one of which may appropriately precede the other. The first is the adjustment of the general revenue level to the demands of a fair return. The second is the adjustment of a rate schedule conforming to that level so as to eliminate discriminations and unfairness from its details. Such an orderly procedure for establishing the rates prescribed by the Act would seem to be an appropriate means of carrying out its provisions.

Federal Power Comm'n v. *Natural Gas Pipeline Co.*, 315 U. S. 575, 584, 62 S. Ct. 736, 86 L. Ed., 1037 (1942).

In the case of *In re Permian Basin Area Rate Cases*, 390 U. S. 747, 88 S. Ct. 1344, 20 L. Ed. 2d 312 (1968), the rates established by the Federal Power Commission for the sale of natural gas were challenged. This Honorable Court, in that most recent utterance on the rate and price fixing authority of Congress and its agencies, said, through Mr. Justice Harlan:

> Price control is "unconstitutional . . . if arbitrary, discriminatory or demonstrably irrelevant to the policy the legislature is free to adopt . . ." *Nebbia* v. *People of the State of New York*, 291 U. S. 502, 539, 54 S. Ct. 505, 517, 78 L. Ed. 940. Nonetheless, the just and reasonable standard of the Natural Gas Act "coincides" with the applicable constitutional standards, *FPC* v. *Natural Gas Pipeline Co., supra*, 315 U. S., at 586, 62

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[6]Natural Gas Act, 15 U.S.C. Sections 717 *et seq.* A similar arrangement is found in the Emergency Petroleum Allocation Act of 1973, 15 U.S.C. Sections 751 *et seq.*

> S. Ct., at 743, and any rate selected by the Commission from the broad zone of reasonableness permitted by the Act cannot properly be attacked as confiscatory. Accordingly, there can be no constitutional objection if the Commision, in its calculation of rates, takes fully into account the various interests which Congress has required it to reconcile. We do not suggest that maximum rates computed for a group or geographical area can never be confiscatory; we hold only that any such rates, determined in conformity with the Natural Gas Act, and intended to "balance . . . the investor and the consumer interests" are constitutionally permissible. *FPC* v. *Hope Natural Gas Co., supra,* 320 U. S. at 603, 64 S. Ct. at 288.

In Re Permian Basin Area Rate Cases, 390 U. S., at 769-770.

Even a public utility, one of the most highly regulated businesses in the American economy,

> . . . is entitled to such rates as will permit it to earn a return on the value of the property which it employs for the convenience of the public equal to that ganerally being made at the same time and in the same general part of the country on investments in other business undertakings which are attended by corresponding risks and uncertainties . . . The return should be reasonably sufficient to assure confidence in the financial soundness of the utility, and should be adequate, under efficient and economical management, to maintain and support its credit and enable it to raise the money necessary for the proper discharge of its public duties. A rate of return may be reasonable at one time, and become too high or too low by changes affecting opportunities for investment, the money market, and business conditions generally.

Bluefield Water Works and Improvement Co. v. *Public Service Comm'n of State of West Virginia*, 262 U. S. 679, 692-693, 43 S. Ct. 675, 67 L. Ed. 1176 (1923).[7]

For *regulated* industries, this Court, in *Bluefield*, concluded:

> Rates which are not sufficient to yield a reasonable return on the value of the property used at the time it is being used to render the service are unjust, unreasonable and confiscatory, and their enforcement deprives the public utility company of its property . . .

Id., 262 U. S. 679, 690.

When Congress gave to the President of the United States authority to impose wage and price controls over all segments of the nation's economy, it required the President to mandate, by Executive Order, that the Federal Reserve Board, by regulation, establish a thorough procedural framework for determining the stabilization of prices, rents, wages, salaries, interest rates, dividends and other exchanges. The enactment created a Temporary Emergency Court of Appeals, empowered with exclusive juris-

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[7] *Bluefield Water Works*, of course, involves a state rate-setting commission, and the rates established in that case were challenged under the Fourteenth Amendment. The standards for rate-setting, whether involving an act of Congress or a state legislature, are not dissimilar. The same protections for property interests apply. The same requirement that rates which are set be "just and reasonable" apply. In fact, the statutory history of rate-setting among the states follow the identical pattern of Congress in that state legislatures have exercised their authority by establishing boards, bodies or commissions to apply appropriate standards, and weigh and balance the property interests, to determine a "just and reasonable" rate. See: *Nebbia* v. *People of the State of New York*, 291 U. S. 502, 54 S. Ct. 505, 78 L. Ed. 940 (1934).

diction to hear appeals from district courts of cases and controversies arising under the program.[8]

All of the challenged enactments aforementioned underscore the power of Congress to regulate, and, indeed, fix, prices. They also underscore the limitations within which Congress may exercise that power. Congress is limited by the force of the Fifth Amendment to the Constitution of the United States. It cannot take property without due process of law or without just compensation. Accordingly, Congress has historically always provided the persons or industries whose prices are regulated with a regulatory board, body or commission to establish or develop a procedural framework to make those determinations and to provide the regulated persons or industries with a mechanism whereby, with industry participation, prices may be established according to a "just and reasonable standard", and may be computed so as not to be "unjust, unreasonable and confiscatory," c.f. *In Re Permian Basin Area Rate Cases*, 390 U. S., at 770. To meet that standard this Honorable Court has repeatedly remarked that various "interests must be balanced" and any rates or prices set must be "reconciled with those interests." *In Re Permian Basin Area Rate Cases*, 390 U. S., at 770; *Bluefield Water Works and Improvement Co.* v. *Public Service Comm'n of State of West Virginia*, 262 U. S., at 397-398; *Federal Power Comm'n* v. *Natural Gas Pipeline Co.*, 315 U. S., at 582-586.

In the instant case Congress; without any examination of prices in the industry; without providing for any protections for the "non-participating" providers involved; without "balancing any interests"; without taking into consideration the vast variations among physicians and

[8]Economic Stabilization Act of 1970, 12 U.S.C. Sections 1904 *et seq.*

surgeons nationwide and their geographic and financial variables; without creating any board, body or commission to survey the health care industry; arbitrarily froze the "non-participating" providers' fees at levels computed in accord with fiscal 1983 profiles. Those physicians and surgeons who are most injured by the fee freeze are those — like Petitioners — who have scrupulously kept their fees low. Their fees are frozen at low profiles. Those physicians and surgeons who have charged exorbitant fees have had their fees frozen at much higher fee levels! The Act permits the "participating" physicians to recapture their profile once the freeze is lifted, but allows no recapture for the "non-participating" physicians.[9]

On the question of what is a reasonable, rational and equitable "minimum" or "maximum" fee, price, wage or rate, this Honorable Court has provided ample law directly on point. "Maximum" fees, prices, wages or rates "must be fixed so that . . . they will yield a reasonable return" for the person or institution whose prices are being regulated. *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U. S. at 397. Unquestionably, Congress, if it is to set a "maximum" fee, price, wage or rate in a given industry, must adjust the

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[9]Section 2306(a) of the "Deficit Reduction Act of 1984" amended Section 1842(b) of the Social Security Act (42 U.S.C. Section 1395u(b)) by adding a new subsection (4)(D) which provides as follows:

> In determining the customary charges for physicians' services furnished during the 12-month period beginning October 1, 1985, or October 1, 1986, by a physician who at no time for any services furnished during the 12-month period beginning October 1, 1984, was a participating physician (as defined in subsection (h) (1)), the Secretary shall not recognize increases in actual charges for services furnished during the 15-month period beginning on July 1, 1984, above the level of the physician's actual charges billed in the 3-month period ending on June 30, 1984.

"revenue level to the demands of a fair return; and adjust the rate schedule . . . so as to eliminate discriminations and unfairness from its details". *Federal Power Comm'n* v. *Natural Gas Pipeline Co.*, 315 U. S. at 584.

Further, "price control is unconstitutional if arbitrary, discriminatory or demonstrably irrelevant to the policy the legislature is free to adopt." *In Re Permian Basin Area Rate Cases*, 390 U. S. at 769.

Clearly, no balancing of interests was accomplished with respect to the challenged Act, and, as a result, the freeze is grossly discriminatory. Congress simply froze "non-participating" physicians' and surgeons' fees. That freeze, alone, adversely affects and will adversely affect Petitioners for many years to come. No survey was performed of physician's fees by any regulatory agency and consequently no reasonable or equitable fee was derived. Critically, no provision was made whereby Petitioners could petition the Respondent Secretary or any agent thereof to determine whether or not an exception may be made where the frozen fee was ruinous to the affected practitioner. No exceptions or means of exclusion were provided. The harmed practitioner would only be able to close his practice or raise his fees and suffer the pangs of being fined and sanctioned. The thrust of the Act is to force "non-participating" physicians and surgeons to "participate."

The United States Court of Appeals for the Eleventh Circuit upheld the fee freeze on account of the fact that it was *temporary*. See Appendix A, pp. 1a through 27a. Petitioners assert that that fact is irrelevant in any determination of the challenged Act's constitutionality. Many of the ratemaking enactments scrutinized by this Honorable Court in the past were temporary measures. Congress can deny property to persons in a temporary act just as surely as a

permanent act. Even if the temporary act was to be examined in a different light than a permanent act in the constitutional context, the court below must be in error in determining the challenged act to be temporary. Section 2306(c) of the "Deficit Reduction Act of 1984" is hardly temporary. Originally designed to freeze non-participating physicians' fees at levels as of calendar quarter beginning April 1, 1984 (1983 levels), for fifteen months, the act has been extended three (3) times. Currently, non-participating physicians' fees remain frozen at the same 1983 levels through December 31, 1986!

Petitioners ask whether or not Congress, without establishing a ratemaking procedure, can, by any legislation, freeze wages, rates or fees, and continually extend same through amendments to budget reconciliation resolutions? Does that process not challenge the carefully-enunciated language of this Honorable Court in the long line of decisions involving the validity of the ratemaking powers of the legislative branch of government? Petitioners believe it does, and they ask that this Honorable Court review the decision of the Court below.

II. Section 2306 of the "Deficit Reduction Act of 1984", Insofar as it Amends the Social Security Act to Penalize Non-Participating Physicians by Legislative and Regulatory Determination, is a Bill of Attainder in Violation of Article I, Section 9, Clause 3, of the Constitution of the United States.

A statute is a bill of attainder if three elements are present: (1) punishment is inflicted by an authority other than a judicial authority, (2) there is a lack of a judicial trial, and (3) there is a designation of an individual or ascertainable group subject to the non-judicial punish-

ment.[10] *Cummings* v. *Missouri*, 71 U. S. (4 Wall) 277, 18 L. Ed. 356 (1867); *Ex parte Garland*, 71 U. S. (4 Wall) 333, 18 L. Ed. 366 (1867); *Fletcher* v. *Peck*, 10 U. S. (6 Cranch) 87, 3 L. Ed. 162 (1810); and *Nixon* v. *Administrator of General Services*, 433 U. S. 425, 469, 97 S. Ct. 2777, 53 L. Ed. 2d 867 (1977).

A wide range of legislatively-imposed penalties constitute non-judicial infliction of punishment. *Cummings* v. *Missouri*, 71 U. S. (4 Wall) 277, 320, 18 L. Ed. 356 (1867). As stated in *United States* v. *Brown*, 381 U. S. 437, 85 S. Ct. 1707, 14 L. Ed. 2d 484 (1965), "it would be archaic to limit the definition of 'punishment' to 'retribution'. Punishment serves several purposes: retributive, rehabilitative, deterrent and preventive."

The Court must look to the statements of the legislature for guidance as to the purpose of the legislation. *U. S.* v. *O'Brien*, 391 U. S. 367, 88 S. Ct. 1673, 20 L. Ed. 2d 672, *reh. den.*, 393 U. S. 900, 89 S. Ct. 63, 21 L. Ed. 2d 188 (1968). Raising fees is not a crime, yet Congress sought to punish "non-participating" physicians if they did so. The Conference Report on PL 98-369, "The Deficit Reduction Act of 1984", reported that the purpose of the directories and the toll-free telephone lines was to disseminate names of "participating" physicians, and the use of direct lines to electronically process claims was to "encourage physicians to voluntarily sign participation agreements". *Cong. Rec.* H6728 (June 22, 1984). "Banishment" from the program for a period of five years and civil assessments were made available to the Respondent Secretary "to protect Medicare

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[10]There never was any serious debate in the Federal Constitutional Convention of 1787 over the seriousness of bills of attainder. They were universally viewed as a fundamental evil. 5 *Debates on the Adoption of the Federal Constitution* (Elliott, J., ed., Phila., 1876), 462, 485, 528, 545, 546 and 561.

beneficiaries from increased charges from physicians who are not participating physicians". *Cong. Rec.* H6728 (June 22, 1984). Section 2306(c) of the "Deficit Reduction Act of 1984" is a classic bill of attainder. Congress has legislatively determined that "non-participating" physicians are guilty of an act that is not a crime. The Conferees' Report stated such: "The conferees expect that the Secretary will exercise this authority vigorously but prudently, applying sanctions commensurate with the offense". *Cong. Rec.* H6728 (June 22, 1984).

The legislative history discusses "incentives" to get physicians to contract with the government, however, the history shows the development of a scheme so coercive that it punishes physicians who exercise their right not to join. With the extensions to the Act, the punitive aspects of it have become pronounced. "Participating" physicians, according to the extension passed by Congress on March 13, 1986, are given an opportunity to have their fee profiles updated as of April 30, 1986. "Non-participating" physician's fees are frozen through December 31, 1986. They have been frozen at 1983 levels since July 18, 1984.

Unquestionably the effect of the challenged Act here is punitive. Congress has not merely placed "burdens" upon the Petitioners. Rather, Congress has singled out those who seek to remain "non-participating" physicians and punished them for their choice; attempting, of course, to *force* the "non-participating" physicians and surgeons to "participate". The Act, insofar as "non-participating" physicians and surgeons are concerned, was meant to be and is punitive. Petitioners are being punished for doing wholly lawful and proper acts: remaining nonparticipants and raising their fees. The fact that no means of applying for and granting exemptions or exclusions in the Act to adversely-affected practitioners underscores its punitive

intent. A physician must either suffer under the freeze and possibly close his or her practice or raise his or her fees and be fined and sanctioned. Again, the intent is to make the system so burdensome and oppressive as to force "non-participating" physicians and surgeons to "participate"

The fact that Petitioners could become "participating" physicians in order to avoid the penalties cannot make the challenged Act any less threatening or any less a bill of attainder. Whether a party can take action to avoid the punitive aspects of a bill of attainder is irrelevant to its constitutionality. Bills of attainder passed by the original thirteen colonies, for example, often provided that taking an oath of allegiance would suspend the penalty. *See*, Hamilton, J. C., 3 *History of the Republic of the United* States 25 (New York 1859); Note, 72 *Yale L. J.* 330, 339-340. After the Constitution was ratified bills of attainder which could be avoided by taking a loyalty oath were held unlawful. *Cummings* v. *Missouri*, 71 U. S. (4 Wall) 277, 18 L. Ed. 356 (1867); *Ex parte Garland*, 71 U. S. (4 Wall) 333, 18 L. Ed. 366 (1866); *Pierce* v. *Carskadon*, 83 U. S. (16 Wall) 234, 21 L. Ed. 276 (1872). Bills of attainder characteristically provide a method of avoiding punishment. *Cummings* v. *Missouri*, 71 U. S. (4 Wall) 277, 18 L. Ed. 356 (1866); *Ex Parte Garland*, 71 U. S. (4 Wall) 333, 18 L. Ed. (1867). The fact that doctors can join the program at a later date ignores the fact, stipulated by the Respondent Secretary in the trial Court below, that the freeze forms the base for increases in successive years. (R. 267-268). Thus, the effect of a one year freeze is felt in perpetuity.

In *Selective Service System* v. *Minnesota Public Interest Research Group*, ___ U. S. ___, 104 S. Ct. 3348, ___ L. Ed. 2d ___ (1984), this Court held that students could re-enter the Selective Service program by registering even after the

deadline thereby holding the challenged statute not a bill of attainder. Here there is no provision for re-entry, without having suffered a penalty. Here, the challenged Act clearly serves a punitive function. The "Deficit Reduction Act of 1984" is an impermissible bill of attainder.

CONCLUSION

For the reasons set forth hereinabove, a Writ of Certiorari should issue to review the Opinion and Judgment of the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS

ELEVENTH CIRCUIT

No. 85-8129

DOUGLASS G. WHITNEY, M.D.,
W. D. JORDAN, M.D., and
FRED SHESSEL, M.D., - - - *Plaintiffs-Appellants,*

v.

MARGARET M. HECKLER, Secretary of the Department of Health and Human Services, - - - - - - *Defendant-Appellee.*

January 22, 1986.

Physicians brought action challenging constitutionality of certain provisions of the Deficit Reduction Act of 1984 which affected the Medicare program. The United States District Court for the Northern District of Georgia, Robert H. Hall, J., 603 F. Supp. 821, upheld constitutionality of challenged provisions, and physicians appealed. The Court of Appeals, Anderson, Circuit Judge, held that: (1) temporary statutory freeze on fees nonparticipating physicians could charge their medicare patients is not an unconstitutional deprivation of nonparticipating physicians' substantive due process rights, despite lack of allegedly necessary administrative mechanism to ensure that all doctors are guaranteed a "reasonable" profit, and (2) civil penalties for nonparticipating physicians who raised their fees to medicare beneficiaries during 15-month freeze period and various incentives provided for doctors to become participating physicians did not constitute a prohibited bill of attainder.

AFFIRMED.

1. **Federal Courts Key 192.5**

Federal court had jurisdiction to hear constitutional challenge to temporary statutory freeze on fees nonparticipating physicians could charge their Medicare patients [42 U.S.C.A. § 1395u(b)(4), (h-j)]; challenge did not involve Medicare Part B claims for benefits, for denial of which Congress had not provided judicial review. Social Security Act, §§ 1842(b)(4), (h-j), as amended, 42 U.S.C.A. §§ 1395u(b)(4), (h-j).

2. **Federal Courts Key 12**

The determine whether an issue is ripe for judicial review, a court must evaluate fitness of issue for judicial decision and hardship to parties of withholding court consideration.

3. **Federal Courts Key 13.5**

Physicians' constitutional challenge to temporary statutory freeze on fees nonparticipating physicians could charge their Medicare patients [42 U.S.C.A. § 1395u(b)(4), (h-j)] was ripe for judicial resolution even though physicians had not actually raised their rates. Social Security Act, § 1842(b)(4), (h-j), as amended, 42 U.S.C.A. § 1395u (b)(4)(h-j).

4. **Constitutional Law Key 278.7(1)**
Social Security and Public Welfare Key 241.10

Temporary statutory freeze on fees nonparticipating physicians could charge their Medicare patients [42 U.S. C.A. § 1395u(b)(4), (h-j)] is not an unconstitutional deprivation of nonparticipating physicians' substantive due process rights, despite lack of allegedly necessary administrative mechanism to ensure that all doctors are guaranteed a "reasonable" profit; Congress could reasonably determine that a temporary fee freeze, pending preparation of a more

comprehensive program, was a reasonable exercise of Congress' legitimate legislative authority to control federal spending in order to alleviate deficit problems and to promote public welfare by precluding physicians from shifting burden of reductions onto Medicare beneficiaries. Social Security Act, § 1842(b)(4), (h-j), as amended, 42 U.S. C.A. § 1395u(b)(4), (h-j).

5. **Eminent Domain Key 2(1.1)**
Social Security and Public Welfare Key 241.10

Temporary statutory freeze on fees nonparticipating physicians could charge their Medicare patients [42 U.S. C.A. § 1395u(b)(4), (h-j)] did not constitute taking of property of nonparticipating physicians without just compensation in violation of Fifth Amendment in view of fact that physicians were not required to treat Medicare patients. U.S.C.A. Const. Amend. 5; Social Security Act, § 1842(b)(4), (h-j), as amended, 42 U.S.C.A. § 1395u(b)(4), (h-j).

6. **Constitutional Law Key 276(1)**
Social Security and Public Welfare Key 241.10

Temporary statutory freeze on fees nonparticipating physicians could charge their Medicare patients [42 U.S.C.A. § 1395u(b)(4), (h-j)] and federal monitoring of nonparticipating physicians' billing practices did not infringe liberty of contract protected by due process clause of the Fifth Amendment. U.S.C.A. Const. Amend. 5; Social Security Act, § 1842(b)(4), (h-j), as amended, 42 U.S.C.A. § 1395u(b)(4), (h-j).

7. **Constitutional Law Key 82.5**
Social Security and Public Welfare Key 241.10

Civil penalties for nonparticipating physicians who raised their fees to Medicare beneficiaries during 15-month

freeze period and various statutory incentives for physisions to become participating physicians, contained in provision of deficit reduction statute establishing temporary statutory freeze on fees nonparticipating physicians could charge their Medicare patients [42 U.S.C.A. § 1395u (b)(4), (h-j)], did not constitute a prohibited bill of attainder; penalties and incentives could not be said to inflict "punishment." U.S.C.A. Const. Art. 1, § 9; Social Security Act, § 1842(b)(4), (h-j), as amended, 42 U.S.C.A. § 1395u(b)(4), (h-j).

A statute inflicts constitutionally forbidden punishment if statutory penalty falls within historical meaning of legislative punishment, statute fails to further any nonpunitive legislative purpose, or legislative history establishes a congressional intent to punish. U.S.C.A. Const. Art. 1, § 9.

Appeal from the United States District Court For the Northern District of Georgia.

Before RONEY and ANDERSON, Circuit Judges, and MORGAN, Senior Circuit Judge.

ANDERSON, Circuit Judge:

Douglass G. Whitney, M.D., W.D. Jordan, M.D., and Fred Shessel, M.D. ("appellants") appeal from the judgment of the district court upholding the constitutionality of certain provisions of § 2306 of the Deficit Reduction Act of 1984, 42 U.S.C.A. § 1395u(b)(4), (h)-(j) (West Supp. 1985). *See Whitney* v. *Heckler*, 603 F. Supp. 821 (N.D. Ga. 1985). Appellants make two primary arguments on appeal: (1) that the fifteen-month freeze in the fees that non-participating physicians may charge their Medicare

patients violates substantive due process,[1] and (2) that the civil penalties for non-participating physicians who raise their fees to Medicare beneficiaries during the fifteen-month freeze and the various incentives provided for doctors to become participating physicians constitute a bill of attainder prohibited by Art. I, § 9 of the United States Constitution. We affirm.

I. BACKGROUND

In 1965, Congress enacted the Medicare program as Subchapter XVIII of the Social Security Act. This program is divided into two parts. Part A provides reimbursement for covered hospital and related services. 42 U.S.C. §§ 1395c-1395i (1982). Part B establishes a voluntary program of supplemental medical insurance benefits for certain medical services, including physicians' services. *Id.* §§ 1395j-1395w. This case involves Part B exclusively.

Under Part B, Medicare enrollees obtain benefits in return for the payment of monthly premiums in an amount determined by the Secretary of Health and Human Services. *Id.* § 1395r. These premiums and contributions from the federal government make up the Federal Supplementary Medical Insurance Trust Fund, out of which payment is made for Part B benefits. *Id.* § 1395t.

Part B enrollees are generally entitled to receive 80% of the "reasonable charge" for medical services. *Id.* § 1395l. This "reasonable charge" is computed according to a formula provided by § 1395u(b). Under this section, a physician's actual billed charge for each service is com-

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[1]Appellants also challenge the statute on two other Fifth Amendment grounds, i.e., that it constitutes a taking of their property without just compensation and infringes their liberty of contract. As we indicate in the text below, these grounds are also without merit.

pared with what he customarily charges for that service (the "customary charge"), and with the charge made for similar services by most doctors in the locality (the "prevailing charge"), and the "reasonable charge" is the lowest of these three.[2]

Prior to the enactment of the Deficit Reduction Act of 1984, a Part B enrollee could pay for medical services in one of two ways. The beneficiary could pay the physician directly and then request reimbursement from Medicare. *Id.* § 1395u(b)(3)(B)(i). Alternatively, if a physician were willing, the beneficiary could assign to the physician the beneficiary's right to reimbursement. *Id.* § 1395u(b)(3)(B)(ii). The physician, as the beneficiary's assignee, then collected payment directly from Medicare.

Under this program, Medicare's "customary" and "prevailing" charge data were updated each year on July 1 based on the prior year's data. Physicians were also permitted to accept or decline assignment on a claim-by-claim

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[2] § 1395u(b)(3) provides in relevant part:

> In determining the reasonable charge for services for purposes of this paragraph, there shall be taken into consideration the customary charges for similar services generally made by the physician or other person furnishing such services, as well as the prevailing charges in the locality for similar services. No charge may be determined to be reasonable in the case of bills submitted or requests for payment made under this part after December 31, 1970, if it exceeds the higher of (i) the prevailing charge recognized by the carrier and found acceptable by the Secretary for similar services in the same locality in administering this part on December 31, 1970, or (ii) the prevailing charge level that, on the basis of statistical data and methodology acceptable to the Secretary, would cover 75 percent of the customary charges made for similar services in the same locality during the last preceding calendar year elapsing prior to the start of the twelve-month period (beginning July 1 of each year) in which the service is rendered . . . .

basis, and if a physician chose not to accept assignment, Medicare placed no limitation on the amount that he could charge a Part B enrollee. Patients of physicians not accepting assignment, however, received Medicare reimbursement only for 80% of Medicare's "reasonable charge," and the beneficiary was responsible for the difference between that figure and the physician's actual charge.

The Deficit Reduction Act of 1984 made several changes in physician reimbursement under Medicare Part B.[3] First, § 2306(a) freezes both the "prevailing" and "customary" charge levels for a fifteen-month period beginning July 1, 1984, at levels no higher than the levels that were set for the twelve-month period beginning July 1, 1983. 42 U.S.C.A. § 1395u(b)(4) (West Supp. 1985).[4] In addition

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[3]Congress has extended until March 15, 1986, the freeze on the actual charges of nonparticipating physicians and on the "prevailing" and "customary" charge levels for Medicare reimbursement. Emergency Extension Act of 1985, Pub. L. No. 99-107, § 5(b), 99 Stat. 479, *amended by* Pub. L. No. 99-155, § 2(d) (Nov. 14, 1985) *and* Pub. L. No. 99-201, § — (Dec. 20, 1985). This extension of the fee freeze neither affects the temporary nature of § 2306 nor changes our analysis of that section's constitutionality.

[4]§ 1395u(b)(4) provides:

> (4)(A) In determining the prevailing charge levels under the third and fourth sentences of paragraph (3) for physicians' services furnished during the 15-month period beginning July 1, 1984, the Secretary shall not set any level higher than the same level as was set for the 12-month period beginning July 1, 1983.
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> (B) In determining the reasonable charge under paragraph (3) for physicians' services furnished during the 15-month period beginning July 1, 1984, the customary charges shall be the same customary charges as were recognized under this section for the 12-month period beginning July 1, 1983.

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to this freeze. § 2306(c) requires physicians to decide before October 1 of each year whether they will be "participating" or "non-participating" doctors for that year. 42 U.S.C.A. § 1395u(h) (West Supp. 1985).[5] A "participat-

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(C) In determining the prevailing charge levels under the third and fourth sentences of paragraph (3) for physicians' services furnished during periods beginning after September 30, 1985, the Secretary shall treat the level as set under subparagraph (A) as having fully provided for the economic changes which would have been taken into account but for the limitations contained in subparagraph (A).

(D) In determining the customary charges for physicians' services furnished during the 12-month period beginning October 1, 1985, or October 1, 1986, by a physician who at no time for any services furnished during the 12-month period beginning October 1, 1984, was a participating physician (as defined in subsection (h)(1) of this section), the Secretary shall not recognize increases in actual charges for services furnished during the 15-month period beginning on July 1, 1984, above the level of the physician's actual charges billed in the 3-month period ending on June 30, 1984.

[5] §1395u(h) provides in relevant part:

(1) Any physician or supplier may voluntarily enter into an agreement with the Secretary to become a participating physician or supplier. For purposes of this section, the term "participating physician or supplier" means a physician or supplier (excluding any provider of services) who, before October 1 of any year beginning with 1984, enters into an agreement with the Secretary which provides that such physician or supplier will accept payment under this part on the basis of an assignment described in subsection (b)(3)(B)(ii) of this section, in accordance with subsection (b)(6)(B) of this section, or under the procedure described in section 1395gg (f)(1) of this title for all items and services furnished to individuals enrolled under this part during the 12-month period beginning October 1 of such year. In the case of a

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ing" physician agrees to accept payment on an assignment basis for services during the twelve-month period beginning October 1. Thus, a "participating" physician's fees are effectively limited to the "reasonable" charge. *Id.* § 1395u (b)(3)(B). A "non-participating" physician, however, may still continue to accept assignment on a case-by-case basis.

Section 2306(c) also provides that a non-participating physician may not charge a Medicare patient in excess of the physician's actual charges for the calendar quarter beginning on April 1, 1984. 42 U.S.C.A. § 1395u(j) (West Supp. 1985). There is no restriction on fees charged to patients who do not receive Medicare assistance. This subsection also requires the Secretary to monitor each non-participating physician's actual charges to Medicare beneficiaries, and if the physician "knowingly and willfully bills . . . [beneficiaries] for actual charges in excess of such physician's actual charges for the calendar quarter beginning on April 1, 1984" the Secretary may bar such physician from participation in the Medicare Program for a period of up to five years and/or impose a civil penalty of up to $2,000 for each violation. *Id.* § 1395u(j)(1), (2).

Finally, § 2306 also provides several incentives for physicians to become "participating" doctors. Under subsections 1395u(h)(2), 1395u(h)(3) and 1395u(j), the Secretary is required to: (1) publish a directory of participating physicians, which is to be made available to Medicare enrollees; (2) maintain a toll-free number for enrollees to obtain the

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newly licensed physician or a physician who begins a practice in a new area, or in the case of a new supplier who begins a new business, or in such similar cases as the Secretary may specify, such physician or supplier may enter into such an agreement after October 1 of a year, for items and services furnished during the remainder of the 12-month period beginning on such October 1.

names and specialties of participating physicians; (3) publish a list of the percentage of patients accepted by each physician on an assignment basis; and (4) provide for electronic receipt of claims from participating physicians so that their claims can be processed more rapidly. In addition, subsection 1395u(b)(4)(D) specifies that in determining the customary charges of "non-participating" physicians for the twelve-month periods beginning October 1, 1985 and October 1, 1986, the Secretary shall not "recognize increases in actual charges for services furnished" during the fifteen-month freeze period. The increase in "participating" physicians' actual charges, however, will be recognized by the Secretary in computing their customary charge levels once the freeze is lifted.

In September 1984, appellants, who are practicing physicians in the Atlanta, Georgia area, filed suit seeking a temporary restraining order to stay operation of § 2306 before they had to elect in October 1984 whether to become "participating" physicians for the upcoming year. They contended that the temporary freeze on the fees that non-participating physicians could charge Part B enrollees, the possible civil penalties for violation of the freeze, the requirement that the Secretary monitor their billing practices, and the exclusion of non-participating physicians from the lists of doctors made available to Medicare enrollees violated the Fifth Amendment to the Constitution and constituted a bill of attainder prohibited by Article I, § 9 of the Constitution. The district court denied both their motion for a temporary restraining order and their request for a stay pending appeal.

In October, appellants filed an amended complaint alleging, *inter alia*, that they did not elect to become "participating" physicians under the Deficit Reduction Act prior to October 1, 1984, that they planned to raise their fees to their patients covered by Medicare Part B within the

fifteen-month period beginning July 1, 1984, that 50-60% of their patients are Medicare Part B enrollees, and that 85% of these patients have supplemental health insurance. After a hearing, the district court granted judgment for the Secretary, upholding the constitutionality of § 2306. *See Whitney*, 603 F. Supp. at 825-29. First, the district court concluded that § 2306 was not a deprivation of due process because the legislation is a "reasonable" means for Congress to reduce federal spending without shifting the burden of cost reduction to the Medicare beneficiaries. *Id.* at 825-26. The district court also rejected appellants' contention that the fee freeze and incentive provisions constituted a taking in violation of the Fifth Amendment, reasoning that there is no unconstitutional taking of property in the instant case because the regulated action is voluntary—i.e., appellants can simply decline to treat Medicare patients if they wish to avoid federal regulation. *Id.* at 826-27. Finally, the court held that § 2306 is not a bill of attainder because this section cannot reasonably be construed as a legislative determination of guilt and imposition of punishment. *Id.* at 827-29.

II. FIFTH AMENDMENT CHALLENGES

A. *Substantive Due Process Challenge to the Fee Freeze*

[1-3] Appellants' principal contention on appeal is that the fifteen-month freeze on the fees non-participating physicians may charge their Medicare patients deprives them of their property in violation of the Due Process Clause of the Fifth Amendment.[6] Appellants concede that Congress

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[6]On appeal, appellee questions whether the district court had jurisdiction to hear this case because Congress has not provided for judicial review of the denial of Medicare Part B claims. *See Heckler* v. *Ringer*, 466 U. S. 602, ___ n. 4, 104 S. Ct. 2013, 2018

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n. 4, 80 L. Ed. 2d 622, 632 n. 4 (1984); *United States* v. *Erika,* 456 U. S. 201, 102 S. Ct. 1650, 72 L. Ed. 2d 12 (1982). As appellee concedes, however, the broad jurisdictional bar recognized in *Ringer* does not preclude a party from raising a "substantial" constitutional challenge unrelated to any claim for benefits under Part B:

> [R]espondents seem to concede that to the extent that their claims are characterized as claims for Part B benefits, there is no judicial review for those claims under [*Schweiker* v. *McClure,* 456 U. S. 188, 192 S. Ct. 1665, 72 L. Ed. 2d 1 (1982) and *United States* v. *Erika,* 456 U. S. 201, 102 S. Ct. 1650, 72 L. Ed. 2d 12 (1982)] . . . . Respondents do argue, however, that to the extent that their claims can be characterized as collateral constitutional challenges, . . . those constitutional challenges are properly before us. In light of our characterization of respondents' claims essentially as claims for benefits, . . . and the fact that whatever constitutional claims respondents assert are clearly too insubstantial to support subject matter jurisdiction, . . . we view this case as involving only respondents' Part A claims.

Ringer, 466 U. S. at ___ n. 4, 104 S. Ct. at 2018 n. 4, 80 L. Ed. 2d at 632 n. 4. Other courts have concluded that *Ringer* does not bar such claims. *See Hatcher* v. *Heckler,* 772 F. 2d 427, 430-32 & n. 7 (8th Cir. 1985) (concluding that constitutional challenges to the Medicare Act itself are not precluded by 42 U.S.C. § 405(h) because such claims are "collateral to, and not 'inextricably intertwined with,' claims for entitlement"); *Michigan Academy of Family Physicians* v. *Blue Cross & Blue Shield of Michigan,* 757 F. 2d 91, 93-94 (6th Cir. 1985) (holding that *Heckler* v. *Ringer* does not bar constitutional and statutory challenge to regulation promulgated by Secretary for Health & Human Services when this challenge is unrelated to a claim for benefits), *cert. granted sub nom. Heckler* v. *Michigan Academy of Family Physicians,* ___ U. S. ___, 106 S. Ct. 58, 88 L. Ed. 2d 47 (1985); *American Medical Ass'n* v. *Heckler,* 606 F. Supp. 1422, 1432-33 (S.D. Ind. 1985) (holding that *Heckler* v. *Ringer* does not prevent court from hearing equal protection challenge to fee freeze provision of § 2306); *Miller* v. *Heckler,* 601 F. Supp. 1471, 1487-88 & n. 11 (E.D. Tex.

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1985) ("[C]onstitutional challenges are cognizable if they are aimed at the Medicare Act itself. Such claims arise solely under the Constitution, and therefore escape section 405(h)'s grasp."). *Cf. Johnson* v. *Robinson*, 415 U. S. 361, 367, 94 S. Ct. 1160, 1165, 39 L. Ed. 2d 389 (1974) (holding that veteran's suit is not barred by 38 U.S.C. § 211(a) because "[a]ppellee's constitutional challenge is not to any such decision of the *Administrator*, but rather to a decision of *Congress* to create a statutory class entitled to benefits that does not include I-O conscientious objectors who performed alternative civilian service") (emphasis in original). Because appellants have raised a substantial challenge to the constitutionality of § 2306, which does not involve a claim for benefits under Part B, we find that we have jurisdiction to hear this case.

In addition, appellee contends that appellants' challenge to the temporary fee freeze may not be ripe for judicial resolution because they have not actually raised their rates. We reject this contention. To determine whether an issue is ripe for judicial review, a court must evaluate (1) "the fitness of the issues for judicial decision" and (2) "the hardship to the parties of withholding court consideration." *Abbott Laboratories* v. *Gardner*, 387 U. S. 136, 149, 87 S. Ct. 1507, 1515, 18 L. Ed. 2d 681 (1967). Because this appeal raises a facial attack on the constitutionality of § 2306 and presents a purely legal question, we will never be in a better position to decide the issue. *See, e.g., Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U. S. 59, 81-82, 98 S. Ct. 2620, 2634-2635, 57 L. Ed. 2d 595 (1978); *McCoy-Elkhorn Coal Corp.* v. *EPA*, 622 F. 2d 260, 264 (6th Cir. 1980). Moreover, deferring resolution of the constitutionality of § 2306 will force appellants to choose between complying with the temporary fee freeze and risking sanctions by raising their rates. It is well established that an issue is ripe for judicial review when the challenging party is placed in the dilemma of incurring the disadvantages of complying or risking penalties for noncompliance. *See, e.g., Doe* v. *Bolton*, 410 U. S. 179, 188, 93 S. Ct. 739, 745, 35 L. Ed. 2d 201 (1974); *Epperson* v. *Arkansas*, 393 U. S. 97, 100, 89 S. Ct. 266, 268, 21 L. Ed. 2d 228 (1968). Hence, we conclude that the ripeness standard has been met in the instant case.

has the power to regulate medical services and charges, Appellants' Brief at 23-25, but nevertheless insist that in doing so, Congress must provide an administrative mechanism to ensure that all doctors are guaranteed a "reasonable" profit. Since Congress has not established such a regulatory board in this case, they argue that their substantive due process rights have been violated. We disagree.

The test for determining whether economic and social regulation meets substantive due process requirements is well established: "[i]f the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied . . . ." *Nebbia* v. *New York*, 291 U. S. 502, 537, 54 S. Ct. 505, 516, 78 L. Ed. 940 (1934); *see also North Dakota State Board of Pharmacy* v. *Snyder's Drug Stores, Inc.*, 414 U. S. 156, 164-67, 94 S. Ct. 407, 412-14, 38 L. Ed. 2d 379 (1973); *In re Permian Basin Area Rate Cases*, 390 U. S. 747, 769-70, 88 S. Ct. 1344, 1361-62, 20 L. Ed. 2d 312 (1968). The Supreme Court has repeatedly emphasized that the judicial role in analyzing due process challenges to economic and social regulation is a limited one:

> The Oklahoma law may exact a needless, wasteful requirement in many cases. But it is for the legislature, not the courts, to balance the advantages and disadvantages of the new requirement . . . . It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.
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> The day is gone when this court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial

> conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought . . . .

Williamson v. *Lee Optical of Oklahoma, Inc.*, 348 U. S. 483, 487-88, 75 S. Ct. 461, 464-65, 99 L. Ed. 563 (1955). *See also Ferguson* v. *Skrupa*, 372 U. S. 726, 729-32, 83 S. Ct. 1028, 1030-32, 10 L. Ed. 2d 93 (1963); *Day-Brite Lighting, Inc.* v. *Missouri*, 342 U. S. 421, 423, 72 S. Ct. 405, 407, 96 L. Ed. 469 (1952); *Nebbia*, 291 U. S. at 537-38, 54 S. Ct. at 516. With these principles in mind, we began our analysis of the constitutionality of the temporary fee freeze.

By enacting § 2306, Congress intended to accomplish two objectives. First, in order to curtail the increase in the federal deficit, Congress froze the "customary" and "prevailing" charges for physician's services during the fifteen-month period from July 1, 1984 to September 30, 1985. *See, e.g.*, 130 Cong. Rec. S. 8373, 7375 (daily ed. June 27, 1984) (Sen. Dole) ("Under § 2306, $2.5 billion will be saved by freezing for fifteen months the customary and prevailing charge levels used to determine what medicare will pay for physicians' services."), *reprinted in* 1984 U. S. Code Cong. & Ad. News 697, 2151, 2156 (hereafter "Legislative History"). In addition, Congress was concerned that non-participating physicians would make up any profits lost as the result of the freeze by raising their actual charges to Medicare enrollees. *See, e.g.* H. R. Conf. Rep. No. 861, 98th Cong., 2d Sess. 757, 1314 (1984) (hereafter "H. R. Conf. Rep. No. 98-861"), *reprinted in* Legislative History at 2002; 130 Cong. Rec. H. 7085, 7086 (daily ed. June 27, 1984) (Rep. Rostenkowski), *reprinted in* Legislative History at 2144. In order to prevent non-participating physicians from shifting the burden of the freeze to Medicare beneficiaries, Congress placed a ceiling on the amount non-participating physicians could charge their Medicare bene-

ficiaries.[7] As Senator Dole, Chairman of the Senate Committee on Finance, explained:

> [T]here has been a great deal of concern about how physicians can be prevented from shifting the burden of such a freeze to beneficiaries. Simply freezing what we pay for physician services provides little protection to program beneficiaries. If a physician does not elect to take assignment, beneficiaries can be held responsible for the full difference between what the program pays and what the physician charges.
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> [T]he conferees spent a great deal of time in discussions with the administration trying to address this concern. As a result, the conferees agreed to a [temporary fee freeze] provision which works in concert with organized medicine's voluntary freeze.

130 Cong. Rec. at S. 8375, *reprinted in* Legislative History at 2156. *Accord* H. R. Conf. Rep. No. 98-861 at 1314, *reprinted in* Legislative History at 2002; 130 Cong. Rec. H. 7085, 7086 (daily ed. June 27, 1984) (Rep. Rostenkowski), *reprinted in* Legislative History at 2144.

The legislative history reveals that the temporary fee freeze provision was carefully drawn in order to accomplish these two objectives—to reduce the federal deficit without placing the burden of such reduction solely on Medicare beneficiaries. The fee freeze is based on each physician's charges for similar services in the quarter immediately pre-

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[7]The temporary fee freeze provision simply reflects a general congressional concern that reductions in Medicare expenditures should not be borne solely by Medicare beneficiaries. *See, e.g.*, 130 Cong. Rec. S. 8373, 8375 (daily ed. June 27, 1984) (Sen. Dole) (noting that physicians, hospitals, laboratories, health insurers, and employers will bear "[e]ighty-two percent of the health care program savings achieved in this bill"), *reprinted in* Legislative History at 2156.

ceding the freeze (i.e., charges for the quarter beginning April 1, 1984). Thus, the fee ceiling is not arbitrary.

Congress also intended this freeze "to work in concert with the efforts—which are to be commended—of the American Medical Association and many individual medical societies which have urged their members voluntarily to freeze their fees." 130 Cong. Rec. H. 7085, 7086 (daily ed. June 27, 1984) (Rep. Rostenkowski), *reprinted in* Legislative History at 2144; *see also* H. R. Conf. Rep. No. 98-861 at 1314 ("[I]n light of the efforts of many medical societies that have urged their members to voluntarily freeze their fees . . ., the Conferees believe that this provision will work in concert with those efforts . . . ."), *reprinted in* Legislative History at 2002.

Significantly, the fee freeze is a *temporary* measure based upon what each physician actually charged Medicare beneficiaries during the April 1, 1984 quarter.[8] During the fifteen-month freeze, the Secretary of Health and Human Services is required to study the issue of medical services provided to Medicare enrollees and to make recommendations for the future "in sufficient detail to serve as the basis for legislative action which Congress can take to assure that any burden of effectively constraining the growth of cost in the Medicare Part B program, which Congress in-

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[8]Appellants contend that one feature of § 2306 will have a permanent effect. They argue that since the Secretary will not recognize any increases in the actual charges of non-participating physicians in calculating the "customary" charge in the future, § 2306 will permanently affect their charges. We reject this contention. The statute will only affect what the Medicare program will pay in the future, and will have no effect on what non-participating physicians can *actually* charge to Medicare patients in the future. As appellants concede, Congress has the authority to determine what the Medicare program itself will pay physicians. Appellants' Brief at 19-20. In addition, appellants have offered no evidence concerning the future effects of this provision.

tends to be borne by providers and physicians, is not transferred (in whole or in part) so as to become an additional burden on Part B beneficiaries in the form of increased out-of-pocket costs, reduced services, or reduced access to needed physician care." Deficit Reduction Act of 1984, Pub. L. No. 98-369, § 2306(d), 98 Stat. 494, 1072.

[4] Under these circumstances, we hold that Congress could reasonably determine that a temporary fee freeze, pending the preparation of a more comprehensive program, was necessary in order to prevent Medicare beneficiaries from bearing the burden of the reduction in Medicare expenditures.

In *Minnesota Ass'n of Health Care Facilities, Inc.* v. *Minnesota Department of Public Welfare,* 742 F. 2d 442 (8th Cir. 1984), *cert. denied,* ___ U. S. ___, 105 S. Ct. 1191, 84 L. Ed. 2d 337 (1985), the Eighth Circuit upheld the constitutionality of a similar statute. In that case, Minnesota had enacted a statute limiting the rates which nursing homes participating in the Medicaid program may charge patients who do not receive Medicaid benefits. The Minnesota Association of Health Care Facilities contended that the regulation of the fees its members could receive from private sources violated the requirements of substantive due process. The Eighth Circuit, however, found that the Minnesota statute satisfied these requirements because "[t]he Minnesota legislature could reasonably find that differences in rates for the same nursing home services, depending wholly upon whether or not a resident receives medical assistance, are inimical to the public welfare, and thus it could properly choose to regulate the rates that nursing homes participating in Medicaid charge the residents who do not receive medical assistance." *Id.* at 447. Similarly, Congress determined in the instant case that limiting the increase in Medicare payments without also limiting the total fees that may be charged to Medicare

beneficiaries would be harmful to the public welfare because it would place the burden of cost reductions solely upon Medicare beneficiaries.[9]

Appellants argue, however, that in order to regulate physicians' fees (i.e., to fix the fees), Congress must establish a regulatory mechanism to set standards in such a way that all physicians can make a "reasonable" profit. As stated above, the due process test is whether the law has a reasonable relation to a proper legislative purpose, and is neither arbitrary nor discriminatory. Under the particular facts and circumstances of this case, we conclude that the legislative purposes are legitimate—i.e., to control federal spending in order to alleviate deficit problems, and to promote the public welfare by precluding physicians from shifting the burden of the reductions onto Medicare beneficiaries—and we conclude that the means chosen by Congress are not unreasonable—i.e., the fees are fixed at what this physician himself charged in the recent past (the quarter immediately preceding the freeze period), and the freeze is temporary pending a study which can form the basis for more permanent legislation. Under these circumstances, we hold that due process does not require Congress to follow the rate-making procedures suggested by appellants. We are not confronted with the issue of whether due process would require ratemaking or other such procedures in

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[9]In fact, the argument for the constitutionality of the provision challenged here is stronger because, unlike the Minnesota statute, Congress is only *temporarily* regulating the fees that may be charged to Medicare beneficiaries. Moreover, in *Minnesota Ass'n of Health Care Facilities,* the legislation fixed the rates charged to persons who were *not* receiving government medical benefits, whereas the instant regulation fixes the fees *only* with respect to persons receiving government medical assistance. Of course, we express no opinion concerning the constitutionality of the more far-reaching Minnesota legislation.

the case of permanent legislation,[10] and we express no opinion thereon. [11]

B. *Other Fifth Amendment Arguments*

[5] Appellants raise two other Fifth Amendment challenges that warrant only brief discussion. First, appellants argue that the temporary freeze on their actual charges to Medicare patients constitutes a taking of their property without just compensation in violation of the Fifth Amendment. This contention, however, lacks merit. It is well established that government price regulation does not constitute a taking of property where the regulated group is not required to participate in the regulated industry. *See, e.g., Bowles* v. *Willingham,* 321 U. S. 503, 517-18, 64 S. Ct. 641, 648-49, 88 L. Ed. 892 (1944) (rent controls do not constitute prohibited taking because statute did not require landlords to offer their apartments for rent); *Minnesota Ass'n of Health Care Facilities, Inc.,* 742 F. 2d at 446 (state statute limiting fees nursing homes participating in Medicaid Program may charge to non-Medicaid patients is not taking within meaning of the Fifth Amendment because "the state does not require that nursing homes admit medical assistance residents and participate in the Medicaid Program"). In the instant case, appellants are not required to treat Medicare patients, and the temporary freeze is therefore not a taking within the meaning of the Fifth Amendment.[12]

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[10]Congress' extension of the freeze until March 15, 1986, *see supra* note 3, does not change the temporary nature of the legislation.

[11]We note that appellants have offered no evidence in this case that the actual charge permitted is unreasonable or arbitrary.

[12]Appellants argue that they have not voluntarily accepted government regulation of their charges to Medicare patients because

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[6] Appellants' next contention is that the temporary fee freeze and the federal monitoring of non-participating physicians' billing practices infringe the liberty of contract protected by the Due Process Clause of the Fifth Amendment.[13] We find this claim to be totally lacking in merit.

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they have not sought to "participate" in the Medicare program. This argument, however, is flawed. Appellants have continued to treat Medicare patients, and two of the appellants have admitted that they occasionally accepted assignments of Medicare reimbursement claims. Record on Appeal at 72. Moreover, the fact that Medicare patients comprise a substantial percentage of their practices does not render their participation "involuntary." *See Bowles* v. *Willingham*, 321 U. S. at 517, 64 S. Ct. at 648 (no taking where rent control statute did not require landlord to rent apartments); *Minnesota Ass'n of Health Care Facilities*, 742 F. 2d at 446 ("MAHCF contends that business realities prevent nursing homes from leaving the Medicaid Program voluntarily. Despite the strong financial inducement to participate in Medicaid, a nursing home's decision to do so is nonetheless voluntary."). Under these circumstances, we hold that appellants' participation in the regulated industry is not involuntary.

[13]At one point, appellants apparently contend that Congress cannot regulate the amount that non-participating physicians charge their Medicare patients because there is no "privity" between the government and these doctors. *See* Appellants' Brief at 38-44 (citing, *inter alia*, *Greene* v. *McElroy*, 360 U. S. 474, 79 S. Ct. 1400, 3 L. Ed. 2d 1377 (1959); *Schware* v. *Board of Bar Examiners*, 353 U. S. 232, 77 S. Ct. 752, 1 L. Ed. 2d 796 (1975); *Coppage* v. *Kansas*, 236 U. S. 1, 35 S. Ct. 240, 59 L. Ed. 441 (1914); *Adair* v. *United States*, 208 U. S. 161, 28 S. Ct. 277, 52 L. Ed. 436 (1907)). This argument is patently frivolous. The Supreme Court decisions upon which appellants rely have either been expressly overruled, *see, e.g.*, *Lincoln Federal Labor Union No. 19,129* v. *Northwestern Iron & Metal Co.*, 335 U. S. 525, 533-37, 69 S. Ct. 251, 255-57, 93 L. Ed. 212 (1949) (expressly rejecting the *Adair-Coppage* interpretation of the Due Process Clause), or are clearly inapposite, *see*

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In order for the challenged provisions to infringe appellants' liberty of contract, they must bear no rational relationship to any legitimate purpose of the Deficit Reduction Act of 1984. *See, e.g., West Coast Hotel Co.* v. *Parrish*, 300 U. S. 379, 391-92, 57 S. Ct. 578, 581-82, 81 L. Ed. 703 (1937). As discussed above, the temporary fee freeze is rationally related to legitimate congressional objectives. Moreover, federal monitoring of the billing practices of non-participating physicians is a reasonable means for determining whether these physicians are complying with the temporary freeze.

III. BILL OF ATTAINDER CHALLENGE

Appellants' final contention is that the incentives in § 2306 for physicians to become participating physicians (providing Medicare enrollees with list of the specialties and phone numbers of participating physicians, more efficient processing of claims and the recognition of increased billing charges to non-Medicare patients in future calculations of participating physicians' "customary" charges) and the statutory enforcement mechanism (civil fines and/or barring non-participating physicians from treating Medicare patients for a period of up to five years) constitute a

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Greene, 360 U. S. at 508, 79 S. Ct. at 1419 (holding that "in the absence of explicit authorization from either the President or Congress, the respondents were not empowered to deprive petitioner of his job in a proceeding in which he was not afforded the safeguards of confrontation and cross-examination"); *Schware*, 353 U. S. at 239-47, 77 S. Ct. at 756-61 (petitioner's exclusion from the practice of law violated Due Process Clause because state could not reasonably find that he had not shown good moral character).

bill of attainder prohibited by Article I, § 9 of the United States Constitution.[14]

[7] A bill of attainder has been defined as a " 'law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial.' " *Selective Service System* v. *Minnesota Public Interest Research Group*, ___ U. S. ___, 104 S. Ct. 3348, 82 L. Ed. 2d 632, 640 (1984) (quoting *Nixon* v. *Administrator of General Services*, 433 U. S. 425, 468, 97 S. Ct. 2777, 2803, 53 L. Ed. 867 (1977)). In determining whether a statute is a bill of attainder, the Supreme Court has cautioned that "[t]he judicial function is 'not to destroy the Act if we can, but to construe it, if consistent with the will of Congress, so as to comport with constitutional limitations.' " *Selective Service System*, ___ U. S. at ___, 104 S. Ct. at 3355, 82 L. Ed. 2d at 642 (*quoting CSC* v. *Letter Carriers*, 413 U. S. 548, 571, 93 S. Ct. 2880, 2893, 37 L. Ed. 2d 796 (1973)). Because we find that § 2306 does not inflict "punishment" forbidden by Article I, § 9 of the Constitution, we hold that it is not a constitutionally prohibited bill of attainder.

[8] A statute inflicts constitutionally forbidden punishment if (1) the statutory penalty falls within the historical meaning of legislative punishment, (2) the statute fails to further any nonpunitive legislative purposes, or (3) the legislative history establishes a congressional intent to

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[14]Historically, a bill of attainder was an Act of the English Parliament sentencing a specified individual or group of individuals to death, while a bill of pains and penalties was a law inflicting punishment other than death. *See, e.g., United States* v. *Brown*, 381 U. S. 437, 441, 85 S. Ct. 1707, 1711, 14 L. Ed. 2d 484 (1965). Article I, § 9 of the United States Constitution has been considered to prohibit bills of pains and penalties as well as bills of attainder. *See, e.g., Nixon* v. *Administrator of General Services*, 433 U. S. 425, 473-74, 97 S. Ct. 2777, 2805-06, 53 L. Ed. 2d 867 (1977).

punish. *See, e.g., Selective Service System*, ___ U. S. at ___, 104, S. Ct. at 3355, 82 L. Ed. 2d at 643; *Nixon*, 433 U. S. at 475-76, 97 S. Ct. at 2806-07. The civil penalty and incentive provisions do not run afoul of the foregoing guideposts. First, the challenged civil penalty and incentive provisions do not fall within the historical meaning of legislative punishment. In upholding the constitutionality of a statute denying federal financial assistance under the Higher Education Act of 1965 to students who fail to register for the military draft, the Supreme Court reasoned that the "mere denial of a noncontractual governmental benefit" did not approach the penalties traditionally associated with bills of attainder.[15] *Selective Service System*, ___ U. S. at ___, 104 S. Ct. at 3356, 82 L. Ed. 2d at 644; *see also Flemming* v. *Nestor*, 363 U. S. 603, 617, 80 S. Ct. 1367, 1376, 4 L. Ed. 2d 1435 (1960) (The disqualification of certain deportees from receipt of Social Security benefits does not constitute a bill of attainder because "the sanction is the mere denial of a noncontractual governmental benefit. No affirmative dis-

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[15]In England, bills of pains and penalties commonly imposed imprisonment, banishment and the punitive confiscation of property. *See Nixon*, 433 U. S. at 474, 97 S. Ct. at 2806. In this country, the punishments forbidden by the Bill of Attainder Clause have been expanded to include statutes barring participation by individuals or groups in specific professions. *See, e.g., United States* v. *Brown*, 381 U. S. 437, 85 S. Ct. 1707, 14 L. Ed. 2d 484 (1965) (law barring Communist Party members from serving as officers in labor unions held to be bill of attainder); *United States* v. *Lovett*, 328 U. S. 303, 66 S. Ct. 1073, 90 L. Ed. 1252 (1946) (holding that law cutting off salaries to three named government employees constituted bill of attainder); *Cummings* v. *Missouri*, 71 U. S. (4 Wall.) 277, 18 L. Ed. 356 (1867) (law disqualifying priest from practicing as clergyman struck down as bill of attainder); *Ex parte Garland*, 71 U. S. (4 Wall.) 333, 18 L. Ed. 366 (1867) (legislative bar excluding lawyers from practice of law violated Bill of Attainder Clause).

ability or restraint is imposed, certainly nothing approaching the 'infamous punishment' of imprisonment . . . ."). Similarly, the challenged provisions in the instant case—the civil enforcement mechanism and the incentives for doctors to become "participating" physicians—do not impose the punishment historically associated with bills of attainder but rather are simply examples of statutory civil penalties frequently enacted to aid the executive branch in the enforcement of the law. *See, e.g., Zwick* v. *Freeman,* 373 F. 2d 110, 119-20 (2d Cir.) (statute prohibiting licensee from employing, without government approval, any person responsibly connected with anyone found to have committed flagrant or repeated violations of the unfair conduct provisions of Perishable Agricultural Commodities Act is not bill of attainder), *cert. denied,* 389 U. S. 835, 88 S. Ct. 43, 19 L. Ed. 2d 96 (1967); *Bearden* v. *Commissioner,* 575 F. Supp. 1459, 1462 (D. Utah 1983) (statute prescribing $500 penalty for filing of frivolous tax return does not constitute bill of attainder.)[16]

With respect to the second and third prongs of the test, the legislative history convincingly establishes that § 2306 was intended to further nonpunitive goals, not to punish nonparticipating physicians. As discussed above, the temporary freeze was intended to prevent Medicare beneficiaries alone from bearing the burden of reduced Medicare expenditures. Moreover, the various incentive provisions of § 2306 were designed to encourage physicians to partici-

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[16]As the court below observed,

> It is common practice for the executive branch to be authorized to impose civil penalties in aid of its enforcement powers. In 1979, there were "some 348 statutory civil penalties enforced by 27 federal departments and independent agencies."

Whitney, 603 F. Supp. at 828 (*quoting* Diver, *The Assessment of and Mitigation of Civil Money Penalties by Federal Administrative Agencies,* 79 Colum. L. Rev. 1435, 1438 (1979)).

pate in the Medicare program and to provide beneficiaries with the information necessary to obtain the services of physicians who would not charge them more than the "reasonable" rate recognized by Congress.[17] Neither the text of § 2306 nor its legislative history suggests that § 2306 was intended to "punish" physicians who elect not to "participate" in the Medicare program. Under these circumstances, we hold that § 2306 does not constitute a bill of attainder prohibited by the Constitution.[18]

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[17]The legislative history provides in part:

> The provision contains several administrative incentives . . . to encourage physicians to voluntarily sign participation agreements. These include publication of directories, use of toll-free telephone lines to disseminate names of participating physicians and the use of direct lines for electronic receipt of claims. In addition, physicians have an incentive to become participating physicians because any normal increase in their actual charges during the 15-month period when medicare's reasonable charges are frozen, will be reflected in updating their future customary charge screen updates.
>
> Much of the success of the new "participating physician" program will depend on the involvement of the Medicare beneficiaries nationwide. In providing an increased amount of information to the beneficiary, the conferees hope they will take this opportunity to become increasingly informed about the practice patterns of the physicians in their communities.

H. R. Conf. Rep. No. 98-861, at 1313-14, *reprinted in* Leglislative History at 2001-02. *Accord* 130 Cong. Rec. S. 8373, 8375 (daily ed. June 27, 1984) (Sen. Dole), *reprinted in* Legislative History at 2157.

[18]Although the Supreme Court has given a "broad and generous meaning" to the constitutional prohibition of bills of attainder, it has warned that this prohibition "was not intended to serve as a variant of the equal protection doctrine, invalidating every Act of Congress or the State that legislatively burdens some persons or groups but not all other plausible individuals. In short,

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IV. CONCLUSION

For the foregoing reasons, the judgment of the district court is therefore

AFFIRMED.

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while the Bill of Attainder Clause serves as an important 'bulwark against tyranny,' . . . it does not do so by limiting Congress to the choice of legislating for the universe, or legislating only benefits, or not legislating at all." *Nixon*, 433 U. S. at 369-71, 97 S. Ct. at 2803-05 (footnotes omitted) (*quoting Brown*, 381 U. S. at 443, 85 S. Ct. at 1712). Since the expansion of constitutionality prohibited "punishment" to reach the civil penalty and incentive provisions here would have precisely this effect, we decline appellants' invitation to do so.

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 85-8129

D.C. Docket No. 84-1926

DOUGLASS G. WHITNEY, M.D.,
W. D. JORDAN, M.D., and
FRED SHESSEL, M.D., - - - *Plaintiffs-Appellants,*

v.

MARGARET M. HECKLER, Secretary of the Department of Health and Human Services, - - - - *Defendant-Appellee.*

Appeal from the United States District Court for the Northern District of Georgia

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Before RONEY and ANDERSON, Circuit Judges, and MORGAN, Senior Circuit Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby, AFFIRMED;

It is further ordered that plaintiffs-appellants pay to defendant-appellee, the costs on appeal to be taxed by the Clerk of this Court.

Entered: January 22, 1986
For the Court: Spencer D. Mercer, Clerk

(s) By: Not Legible
Deputy Clerk

ISSUED AS MANDATE: Feb. 20, 1986

IN THE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil Action No. C84-1926

DOUGLASS G. WHITNEY, M.D., et al., - - *Plaintiffs*

v.

MARGARET HECKLER, Secretary of the Department of Health and Human Services - - - - - - - - *Defendant.*

ORDER—Filed February 4, 1985

This case came to be heard on the merits on November 2, 1984. The parties have stipulated to the relevant facts. The court hereby makes this order, incorporating the agreed-upon facts and setting out the court's conclusions of law.

I. FACTUAL BACKGROUND

1. The three plaintiffs in this case, Douglass G. Whitney, M.D., W. D. Jordan, M.D., and Fred Shessel, M.D., are duly licensed and practicing private physicians in the Atlanta, Georgia area who challenge the constitutionality of certain provisions of the Deficit Reduction Act of 1984, P. L. 98-369, which affect the Medicare Program.

2. The Medicare Program was enacted in 1965 as Subchapter XVIII of the Social Security Act. This program is divided into two parts. Part A provides reimbursement

for covered hospital and related post-hospital services. 42 U.S.C. §§ 1395c; 1395d. Persons who are eligible for Medicare may elect to enroll in Part B, which establishes a program of supplementary medical insurance providing reimbursement for covered physicians' and other related medical services. 42 U.S.C. §§ 1395k, 1395l, 1395x(s). This case involves Part B exclusively.

3. Under Part B, Medicare enrollees obtain benefits in return for the payment of monthly premiums, the amount of which is determined by the Secretary of Health and Human Services (the "Secretary"). 42 U.S.C. § 1395r(b)-(c). These premiums and contributions from the Federal Government make up the Federal Supplementary Medical Insurance Trust Fund, out of which payment is made for the benefits provided under Part B. 42 U.S.C. § 1395t.

4. Medicare Part B payments are made on a "reasonable charge" basis. This "reasonable charge" is computed according to a formula set out by statute. Under 42 U.S.C. § 1395u(b)(3), a physician's (1) actual billed charge for each service is compared with (2) what he or she customarily charges for that service—the "customary" charge—and with (3) the charge made for similar services by most physicians in the billing physician's locality—the "prevailing" charge. (The "prevailing" charge is the "level that, on the basis of statistical data . . ., would cover 75 percent of the customary charges made for similar services in the same locality. . . ." 42 U.S.C. § 1395u(b)(3).) The Medicare program then recognizes the lowest of these three as the "reasonable charge."

5. Prior to the enactment of the Deficit Reduction Act, payment for physicians' services was made in one of two ways. The beneficiary could pay the physician directly and then request reimbursement of the "reasonable charge" from Medicare. 42 U.S.C. § 1395u(b)(3)(B)(i). Alternatively, the beneficiary could, if the physician was willing,

assign to the physician the beneficiary's right to reimbursement. 42 U.S.C. § 1395u(b)(3)(B)(ii). The physician could then collect payment from Medicare as assignee of the beneficiary. An assignment did not affect the amount that Medicare paid for the physician's services, but did preclude the physician from charging the beneficiary more than the 20 percent coinsurance on Medicare payments.

6. Prior to the enactment of the Deficit Reduction Act, Medicare's "customary" and "prevailing" charge data were updated on July 1 of each year based on the prior year's data. Physicians were permitted to accept or not accept assignment on a claim-by-claim basis, and if a physician chose not to accept assignment, Medicare placed no limitation on the amount that he or she could charge a Medicare beneficiary. Patients of physicians not accepting assignment received Medicare reimbursement only to the extent of the physician's "reasonable charge." The beneficiary was responsible for the difference between the physician's actual charge and 80 percent of Medicare's "reasonable charge."

7. Section 2306 of the Deficit Reduction Act, which was signed by President Reagan on July 18, 1984, makes several changes that affect physician reimbursement. First, § 2306(a) modifies 42 U.S.C. § 1395u(b) by adding a new subsection (4). The new provision freezes both Medicare's "prevailing" and "customary" charge levels for "the 15-month period beginning July 1, 1984" at levels no higher than the levels that were set for "the 12-month period beginning July 1, 1983."

8. Second, § 2306(c) of the Deficit Reduction Act amends 42 U.S.C. § 1395u by adding a new subsection (h). Subsection (h) requires physicians to decide before October 1 of each year whether they will be "participating" or "non-participating physicians." A "participating phy-

sician" enters into an agreement with the Secretary to accept payment on an assignment basis for all items or services furnished to Medicare beneficiaries during the 12-month period beginning October 1. A "participating physician" may not charge any Medicare patient on any basis other than on an assignment basis during the 12-month period covered by the agreement. "Non-participating physicians," those who do not enter into an agreement with the Secretary to accept payment on an assignment basis for all items or services furnished to Medicare beneficiaries, may continue to accept assignment on a claim-by-claim basis.

9. Third, § 2306(c) of the Deficit Reduction Act adds a new subsection (j) to 42 U.S.C. § 1395u which freezes the actual amount "non-participating physicians" may charge Medicare patients for the fifteen month period which began on July 1, 1984. Subsection (j) requires the Secretary to monitor each "non-participating physician's" actual charges to beneficiaries for services rendered during that period. If a "non-participating physician" knowingly and willfully bills . . . [beneficiaries] . . . for actual charges in excess of such physician's actual charges for the calendar quarter beginning on April 1, 1984," the physician may be sanctioned by the Secretary. The Secretary may bar said physician from participation in the Medicare program for up to five years, or may impose a civil penalty of up to $2,000 per violation. 32 U.S.C. § 1395u(j)(1) and (2).

10. Finally, § 2306 of the Deficit Reduction Act directs that the Secretary publish a directory of "participating physicians" to be made available to Medicare beneficiaries; maintain toll-free telephone numbers at which beneficiaries may obtain the names, addresses, telephone numbers and specialties of "participating physicians"; publish a list containing the name, address, specialty and percent of claims

submitted with respect to each physician paid on an assignment basis; and provide for the electronic receipt by carriers of claims from "participating physicians," thereby enabling those physicians to have their claims processed more quickly. 42 U.S.C. §§ 1395u(h)(2)-(3) and 1395u(i). Congress also created a new subsection (4)(D) to 42 U.S.C. § 1395u(b), which specifies that in determining the customary charges of "non-participating physicians" for the 12-month periods beginning October 1, 1985 and October 1, 1986, the Secretary shall not "recognize increases in actual charges for services furnished" during the 15-month freeze period. The Secretary shall, on the other hand, recognize increases in the actual charges of "participating physicians" during that period. Although their reimbursement is limited by the customary and prevailing charge freeze while the freeze is in effect, "participating physicians'" increased actual charges during the freeze will form the data base for computing their "customary" charge levels once the freeze is lifted.

11. In their Verified Complaint for Injunctive Relief and Declaration of Rights, as amended, plaintiffs allege, *inter alia*, that they did not elect to become "participating physicians" under the Deficit Reduction Act prior to October 1, 1984; that they plan to raise their fees to their patients enrolled under Medicare Part B within the 15-month period beginning July 1, 1984; that 50 to 60 percent of their patients are Medicare Part B enrollees; that 85 percent of these patients have supplemental health insurance; and that the Deficit Reduction Act of 1984 as applied to them violates the Fifth Amendment to and Article I, Section 9 of the United States Constitution.

12. The defendant, the Secretary of the Department of Health and Human Services, maintains that § 2306 of the Deficit Reduction Act is a constitutional exercise of Congress' authority which comports fully with the due

process guaranteed by the Fifth Amendment and does not violate Article I, Section 9 of the Constitution. She has filed a motion under Rule 12(b)(6) of the Federal Rules of Civil Procedure to dismiss the plaintiffs' complaint for failure to state a claim upon which relief can be granted.[1]

13. This Court, after considering the plaintiffs' pleadings and hearing argument from both sides, denied plaintiffs' motion for a temporary restraining order on September 26, 1984. By Stipulation and Order dated October 15, 1984, the parties agreed to present this case on the merits, without presenting live testimony, as to whether the questioned portions of the Deficit Reduction Act of 1984 are unconstitutional and should be permanently enjoined. On November 2, 1984, this court heard oral arguments on the merits by counsel for each party.

II. CONCLUSONS OF LAW

1. In 1984, Congress was faced with skyrocketing costs in the Medicare Program, which, along with numerous other factors, were contributing to the rapidly increasing federal deficit. Accordingly, along with many other measures in the Deficit Reduction Act, it curtailed the increase in certain federal outlays by freezing the customary and prevailing charges recognized by Medicare for physician's services for the 15-month period running from July 1, 1984 to September 30, 1985. However, Congress did not want the burden of the freeze to be borne by the elderly beneficiaries of the Medicare Program. As stated by Senator Dole, Chairman of the Senate Committee on Finance:

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[1]Because the parties stipulated that the court should decide the case on the merits, rather than on a procedural motion, the court DENIES defendant's motion to dismiss.

> Under section 2306, $2.5 billion will be saved by freezing for 15 months the customary and prevailing charge levels used to determine what medicare will pay for physician services. Needless to say, there has been a great deal of concern about how physicians can be prevented from shifting the burden of such a freeze to beneficiaries. *Simply freezing what we pay for physician services provides little protection to program beneficiaries.* If a physician does not elect to take assignment, beneficiaries can be held responsible for the full difference between what the program pays and what the physician charges.
>
> Mr. President, the congress spent a great deal of time in discussions with the administration trying to address this concern. As a result, the conferees agreed to a provision which works in concert with organized medicine's voluntary freeze.

130 Cong. Rec. S. 8373, 8375 (daily ed. June 27, 1984) (emphasis added), reprinted in 1984 U. S. Code Cong. & Admin. News, Deficit Reduction Act Legislative History at 1462 (hereinafter "Legislative History"). Similarly, Congressman Rostenkowski, Chairman of the House Committee on Ways and Means, stressed that the measure included "protection for beneficiaries."

> There is a 15-month freeze on medicare-recognized physician fee increases, with protection for beneficiaries. Under this provision, doctors who become medicare "participating physicians" would accept the medicare fee allowance as payment in full. Other physicians would be prohibited from raising their medicare fees. Thus, *beneficiaries would have full protection against the possibility that they rather than the physicians, might bear the effect of the fee freeze.* The fee freeze provisions are intended to work in con-

> cert with the efforts — which are to be commended — of the American Medical Association and many individual medical societies which have urged their members voluntarily to freeze their fees.

130 Cong. Rec. H 7085, 7086 (daily ed., June 27, 1984) reprinted in Legislative History at 1450 (emphasis added). *Accord*, H. Conf. Rep. No. 98-861, reprinted in Legislative History at 751, 1308.

2. The temporary freeze on the fees non-participating physicians may charge their Medicare patients is an integral, reasonable part of Congress' exercise of its undisputed authority to control federal spending. Congress did not want the burden of its fiscal measure to be shifted to the elderly Medicare beneficiaries.

3. Plaintiffs contend that the contested portions of § 2306 deprive them of their liberty in violation of the Fifth Amendment to the United States Constitution. However, the substantive due process cases on which they rely, such as *Adair* v. *United States*, 208 U. S. 161 (1905) and *Coppage* v. *Kansas*, 236 U. S. 1 (1915), have long been "sapped . . . of their authority." *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U. S. 177, 187 (1941). The authorities cited by Plaintiff belong to an overruled "vintage of decisions which exalted substantive due process by striking down state [and federal] legislation which a majority of the Court deemed unwise." *North Dakota State Board of Pharmacy* v. *Snyder's Drug Stores, Inc.*, 414 U. S. 156, 164 (1973).

4. Plaintiffs' denial of liberty argument is readily disposed of under the law of substantive due process which now governs. This case is similar to the recent case of *Minnesota Association of Health Care Facilities* v. *Minnesota Department of Public Welfare*, 742 F. 2d 422 (8th Cir. 1984), which upheld the constitutionality of a Minne-

sota statute limiting the rates nursing homes which participate in the Medicaid Program may charge residents who do not receive Medicaid benefits.[2] The Minnesota Association of Health Care Facilities contended that regulation of the fees they could receive from private sources denied them their constitutional right to due process of law. The Eighth Circuit found that the Minnesota statute satisfied substantive due process requirements:

> "If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied, and judicial determination to that effect renders a court *functus officio*." *Nebbia* v. *New York, supra* 291 U. S. at 537; *see North Dakota State Board of Pharmacy* v. *Snyder's Drug Stores, Inc.*, 414 U. S. 156, 164-67 (1973); *Ferguson* v. *Skrupa*, 372 U. S. 726, 728-32 (1963); *Williamson* v. *Lee Optical Co.*, 348 U. S. 483, 488 (1955). The Minnesota legislature could reasonably find that differences in rates for the same nursing home services, depending wholly upon whether or not a resident receives medical assistance, are inimical to the public welfare, and thus it could properly choose to regulate the rates that nursing homes participating in Medicaid charge to residents who do not receive medical assistance. The statute enacted to achieve this purpose has a rational relationship to the end sought and is not arbitrarily or impermissibly discriminatory.

742 F. 2d at 447.

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[2]The Medicaid Program was created in 1965 as Title XIX of the Social Security Act, 42 U.S.C. §§ 1396 *et seq.* It authorizes grants to the states to help fund medical assistance programs for the needy.

5. The finding of *Minnesota Association* is equally applicable here.[3] Congress has reasonably found that limiting the increase in Medicare payments without also limiting the total fees which may be charged to Medicare beneficiaries would be harmful to the public welfare. Section 2306 is constitutional because it is a reasonable means of reducing the federal budget without burdening Medicare beneficiaries. It is neither arbitrary nor impermissibly discriminatory. Non-participating physicians are the only ones who will be treating Medicare beneficiaries on a non-assigned basis, so it is only necessary to limit and monitor their fees to achieve Congress' intent. Lists of participating physicians will be created not to harm non-participating physicians, but to provide important information to Medicare beneficiaries seeking to minimize their medical expenditures.

6. In its decision, the Eighth Circuit relied on *Nebbia* v. *New York*, 291 U. S. 502 (1934), the case which marks the demise of the use of the substantive due process doctrine to invalidate state and federal regulations in the economic sphere. In *Nebbia*, the Supreme Court held that it was constitutional for a state to fix the selling price of milk. "[N]either property rights nor contract rights are absolute . . . Equally fundamental with the private right is that of the public to regulate it in the common interest." *Id.* at 523 (footnotes omitted). The Court went on to state:

> The Fifth Amendment, in the field of federal activity, and the Fourteenth, as respects state action, do not prohibit governmental regulation for the public welfare. They merely condition the exertion of the

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[3]If anything, the case at hand is stronger, since Congress is regulating only the fees which may be charged to Medicare beneficiaries. Moreover, this regulation is only a temporary one.

> admitted power, by securing that the end shall be accomplished by methods consistent with due process. And the guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained.

Id. at 525 (footnotes omitted).

7. Here, Congress reasonably found that a freeze on federal Medicare payments would harm Medicare beneficiaries unless it also acted to place a cap upon the total fees which could be charged to these beneficiaries by their physicians. Congress also reasonably determined that the interests of Medicare patients would be served if more physicians limited their fees and took cases on an assigned basis. Therefore, it established incentives for physicians to "participate," and agree to take all cases on an assigned basis for a one-year period. These aspects of § 2306 are reasonable in relation to the Medicare program, and were adopted in the interests of the community. Therefore, due process has been satisfied.

8. Plaintiffs next claim that the freeze on their fees and the alleged encouragement to Medicare beneficiaries to use participating physicians constitutes a taking of their property without due process of law in violation of the Fifth Amendment. However: "It has long been recognized that the Fifth Amendment prohibitions [sic] against the taking of property for public use without just compensation or due process of law refers only to direct appropriation and not to consequential injuries resulting from the exercise of lawful regulations." *Condor Operating Co.* v. *Sawhill*, 514 F. 2d 351, 361 (Temp. Emer. Ct. App.), *cert. denied*, 421 U. S. 976 (1975), citing *Bowles* v. *Willingham*, 321 U. S. 503 (1944). Moreover, price controls are

"one of the means available . . . to the Congress . . . for the protection and promotion of the welfare of the economy." *Sunshine Anthracite Coal Co.* v. *Adkins,* 310 U. S. 381, 394 (1940). Since § 2306 is a lawful exercise of Congress' power, any consequential injuries to plaintiffs do not constitute a "taking."

9. The nursing homes who were plaintiffs in *Minnesota Association, supra,* also argued that their property was being taken without just compensation, relying, like plaintiffs here, on *Bluefield Water Works & Improvement Co.* v. *Public Service Commission,* 262 U. S. 679 (1923). The Eighth Circuit found public utilities cases "inapposite, however, because the present case simply does not involve a forced taking of property by the state." *Minnesota Association,* 742 F. 2d at 446. The nursing homes had argued that "business realities" prevented them "from leaving the Medicaid program voluntarily." The court held that "[d]espite the strong financial inducement to participate in Medicaid, a nursing home's decision to do so is nonetheless voluntary." *Id.* The Eighth Circuit went on to state: "This voluntariness forecloses the possibility that the statute could result in an imposed taking of private property which would give rise to the constitutional right of just compensation, and thus it is unnecessary in this case to employ the adequacy standards applicable to state regulation of public utility rates." *Id.*

10. This holding also applies to the case at hand. While plaintiffs seek to distinguish *Minnesota Association* on the ground that they have not voluntarily agreed to accept regulation because they have chosen not to "participate" in the Medicare Program, plaintiffs have the further option of not treating Medicare patients at all and thus being able to raise fees to all their patients without penalty. While they, like the nursing homes, may have a "strong financial inducement" to serve Medicare beneficiaries, their

decision to do so is nonetheless voluntary. Thus, § 2306 cannot be found to have effected an unconstitutional taking of property.

11. Plaintiffs' final argument is that the challenged portions of § 2306 of the Deficit Reduction Act are a bill of attainder which is proscribed by Article I, Section 9 of the United States Constitution. They contend that § 2306 inflicts punishment on non-participating physicians without a judicial trial. The alleged punishment has two aspects: (1) subjecting non-participating physicians to civil money assessments and barring them from participating in the Medicare Program for a prescribed period if they raise their fees to Medicare beneficiaries while the 15 month freeze is in effect; and (2) depriving these physicians of the right to be listed in the directories of participating physicians mandated by the Act. However, the burdens which plaintiffs perceive to flow from Congress' efforts to reduce the federal deficit while at the same time protecting Medicare beneficiaries simply do not constitute a bill of attainder.

12. Historically, a bill of attainder was an Act of the English Parliament sentencing a specified individual or group of individuals to death. Article I, Section 9 of the United States Constitution is also considered to prohibit "bills of pains and penalties," i.e. legislative Acts inflicting punishment other than death. *See Nixon* v. *Administrator of General Services,* 433 U. S. 425, 473-74 (1977). While Supreme Court cases have given a "broad and generous meaning to the constitutional protection against bills of attainder," *Id.* at 469, plaintiffs here seek an impermissibly broad interpretation.

13. A bill of attainder is defined as a law which legislatively determines guilt and imposes punishment upon a designated person or class of persons without benefit of judicial trial. *Nixon* v. *Administrator of General Services,*

supra; United States v. *Brown*, 381 U. S. 437 (1965); *Cummings* v. *Missouri*, 71 U. S. 277 (4 Wall 277) (1866). In determining whether § 2306 is a bill of attainder "[t]he judicial function is 'not to destroy the Act if we can, but to construe it, if consistent with the will of Congress, so as to comport with constitutional limitations . . . .'" *Selective Service System* v. *Minnesota Public Interest Research Group*, ___ U. S. ___, 104 S. Ct. 3348, 3355 82 L. Ed. 2d 632 (1984), quoting *CSC* v. *Letter Carriers*, 413 U. S. 548 (1973).

14. Section 2306 cannot reasonably be construed as a legislative determination of guilt and imposition of punishment. As described above, this provision of the Deficit Reduction Act freezes the reasonable charges which will be paid by Medicare for physicians' services for a 15-month period. To avoid the shifting of the burden of the freeze to elderly Medicare beneficiaries, Congress also froze the actual charges which physicians taking cases on a non-assigned basis may bill their patients. To enforce the latter aspect of the freeze, the Secretary is directed to monitor non-participating physicians' actual charges, and is authorized to impose civil sanctions on physicians who knowingly and willfully raise their charges to Medicare enrollees. Thus, non-participating physicians are not legislatively determined to be guilty of an offense. Furthermore, Congress has not deprived plaintiffs of any right to participate in what they call a referral program. The plaintiffs have voluntarily chosen not to be participants.

15. Congress has properly exercised its authority to temporarily freeze the fees of non-participating physicians, and has given the executive branch the authority to enforce the legislation. It is common practice for the executive branch to be authorized to impose civil penalties in aid of its enforcement powers. In 1979, there were "some 348 statutory civil penalties enforced by 27 federal depart-

ments and independent agencies." Diver, *The Assessment and Mitigation of Civil Money Penalties by Federal Administrative Agencies*, 79 Colum. L. Rev. 1435, 1438 (1979).

16. In addition, plaintiffs cannot satisfy the following three inquiries established by the Supreme Court for determining "whether a statute inflicts forbidden punishment":

> (1) whether the challenged statute falls within the historical meaning of legislative punishment; (2) whether the statute, "viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes"; and (3) whether the legislative record "evinces a congressional intent to punish." *Nixon, supra*, 433 U. S. at 473, 475-76, 478. . . .

Selective Service System, supra, 104 S. Ct. at 3355-56.

17. In *Selective Service System*, the Supreme Court upheld the constitutionality of § 1113 of the Department of Defense Authorization Act of 1983 ("§ 1113"), which denies federal financial assistance under Title IV of the Higher Education Act of 1965 to male students who fail to register for the draft. The Court found that under these criteria § 1113 was not a bill of attainder. With regard to the first question, the Court found that the denial of a noncontractual benefit did not approach " 'the infamous punishment of imprisonment' or other disabilities historically associated with punishment." *Id.* at 3356. Moreover, the denial of benefits was not even permanent, since the students could become eligible for Title IV aid "simply by registering late." *Id.*

18. Here too, the alleged punishments do not fall within the "historical meaning of legislative punishment." In addition, plaintiffs may avoid punishment by not raising their fees. They may also remove themselves from the

class allegedly being punished by becoming participants. While they did not meet the deadline of October 1, 1984 for the current year, they may become participants for any subsequent year.

19. With regard to the second and third inquiries, the Supreme Court found that § 1113 furthered the nonpunitive goals of encouraging young men to register for the draft, and furthered a "fair allocation of scarce federal resources . . . ." *Id.* at 3357. Section 2306 is also designed to further non-punitive goals. The freeze was not designed to punish non-participating physicians, but to protect Medicare beneficiaries. The publication of a directory of participating physicians was intended to encourage participation, and enable beneficiaries to avail themselves of the services of physicians who will not charge them more than the "reasonable" rate recognized by Medicare.

20. Plaintiffs recognize Congress' unambiguous statement of intent, but seek to read other motives into the statute. However, this court must look only at the language of § 2306 and the reasons Congress gave for its enactment in determining whether the section is valid: "In judging the constitutionality of the Act, we may only look to its terms, to the intent expressed by Members of Congress who voted its passage, and to the existence or nonexistence of legitimate explanations for its apparent effect." *Nixon, supra,* 433 U. S. at 484. The terms of § 2306, the consistent, explicit statements of legislative intent, and the existence of legitimate explanations for the statute, make it clear that § 2306 is not a punitive bill of attainder.

21. Congress has properly exercised its constitutional authority in enacting § 2306(c) of the Deficit Reduction Act of 1984, and judgment is hereby entered for defendant.

So ORDERED, this 4th day of February 1985.

(s) Robert H. Hall
Robert H. Hall
United States District Judge

JUDGMENT IN CIVIL CASE

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF GEORGIA

Docket No. C84-1926A

DOUGLASS G. WHITNEY, M.D.,
W. D. JORDAN, M.D., and
FRED SHESSEL, M.D.

v.

MARGARET M. HECKLER, Secretary of
the Department of Health and
Human Services

Judge Robert H. Hall

☐ **Jury Verdict.** This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered its verdict.

☒ **Decision by Court.** This action came to trial or hearing before the Court with the judge named above presiding. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the plaintiffs DOUGLASS G. WHITNEY, M.D., W. D. JORDAN, M.C. and FRED SHESSEL, M.D. take nothing, that the action be dismissed on the merits and that defendant MARGARET HECKLER, Secretary of Health and Human Services recover plaintiffs her costs of this action.

FILED & ENTERED in Clerk's Office
This 4th day of February, 1985
Ben H. Carter, Clerk

(s) By: A. B. Hanley
Deputy Clerk

Ben H. Carter, Clerk

(s) By A. B. Hanley, Deputy Clerk Feb. 4, 1985

Supreme Court, U.S.
FILED
JUL 21 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1696

In the Supreme Court of the United States

OCTOBER TERM, 1986

DOUGLAS B. WHITNEY, M.D., ET AL., PETITIONERS

v.

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioners are physicians who have chosen to treat Medicare patients, but have declined to participate in a Medicare program that provides physicians with direct payment of a patient's Medicare insurance benefits. Petitioners contend that Section 2306(c) of the Deficit Reduction Act of 1984 (DRA), 42 U.S.C. (Supp. II) 1395u(h)-1395u(j), which temporarily freezes the fees that "non-participating" physicians may charge Medicare beneficiaries, violates the Due Process Clause. They also contend that Section 2306(c), which provides incentives for physicians to participate in the direct payment program and creates administrative sanctions for non-participating physicians who unlawfully raise the fees they charge Medicare patients, constitutes an unconstitutional bill of attainder.

1. Congress enacted the Medicare program as Subchapter XVIII of the Social Security Act, 42 U.S.C. (& Supp. II) 1395 *et seq.* Under Part B of that Subchapter, eligible persons may participate in a program providing supplemental medical insurance benefits for certain services, including physician services. See 42 U.S.C. (& Supp. II) 1395j-1395w. Prior to the enactment of the DRA, a person covered by Part B of Medicare could either pay the physician the full amount of the charge for treatment and then obtain federal reimbursement for 80% of the "reasonable" charge for that treatment, or he could, if the physician agreed, assign to the physician his right to reimbursement (42 U.S.C. 1395*l*, 1395u(b)(3)(B)). In the latter instance, the physician would collect from the patient no more than the remaining 20% of the "reasonable" charge (42 U.S.C. 1395*l*). Congress defined a "reasonable" charge as the lowest of (1) the physician's "actual charge," (2) his "customary" charge, or (3) the charge "prevailing" among most local physicians for the particular services. See 42 U.S.C. 1395u(b)(3). Medicare's "customary" and "prevailing" charge data were updated on July 1 of each year.

The DRA made several changes in physician reimbursement. First, Section 2306(a) froze both the "prevailing" and "customary" charge levels for a 15-month period beginning July 1, 1984, at levels no higher than those for the 12-month period beginning July 1, 1983 (42 U.S.C. (Supp. II) 1395u(b)(4)). In addition, Section 2306(c) requires that physicians decide before October 1 of each year whether they will be "participating" or "non-participating" physicians for that year (42 U.S.C. (Supp. II) 1395u(h)). A participating physician agrees to accept payment on an assignment basis for all his Medicare patients and his total fee for a Medicare patient is effectively limited to the "reasonable" charge. A physician who chooses "non-participating" status receives payment from the patient but may continue to accept assignment on a case-by-case basis.

Section 2306(c) of the DRA also provides, as a temporary measure, that a non-participating physician may not bill a Medicare patient for actual charges in excess of the physician's actual charges for that service in the calendar quarter beginning April 1, 1984 (42 U.S.C. (Supp. II) 1395u(j)).[1] This subsection also requires the Secretary to monitor compliance. The Secretary may bar a physician who knowingly and willfully violates the fee limitation from future participation in the Medicare program for up to five years and may impose a civil penalty of up to $2,000 for each violation (42 U.S.C. (Supp. II) 1395u(j)(1), (2)).

Finally, Section 2306(c) of the DRA provides several incentives for physicians to "participate" in the direct payment program. It instructs the Secretary to: (1) publish a directory of participating physicians and make that directory available to Medicare enrollees; (2) maintain a toll-free telephone number for enrollees to obtain the names and specialties of participating physicians; (3) publish a list of the percentage of patients accepted by each physician on an assignment basis; and (4) provide for electronic receipt of claims from participating physicians so that their claims can be processed more rapidly. 42 U.S.C. (Supp. II) 1395u(h), (i). In addition, Section 2306(a) of the DRA provides that in determining the "customary" charges of non-participating physicians for the 12-month periods beginning October 1, 1985 and October 1, 1986, the Secretary shall not "recognize increases in actual charges for services furnished" during the freeze period (42 U.S.C. (Supp. II) 1395u(b)(4)(D)). Any increases in participating physicians' actual charges,

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[1]Section 2306(c) places no restriction on the fees a non-participating physician may charge non-Medicare patients.

however, will be recognized in computing their "customary" charge profiles once the freeze is lifted.[2]

2. Petitioners are non-participating physicians who treat Medicare patients and are thus subject to the DRA's fee freeze. They filed suit in the United States District Court for the Northern District of Georgia, challenging the constitutionality of Section 2306. They contended that the fee freeze violates the Due Process Clause and that the provisions providing incentives for participation in the direct payment plan and sanctioning freeze violations constitute a bill of attainder. The district court rejected these arguments (Pet. App. 29a-45a) and the court of appeals affirmed (*id.* at 1a-27a).

The court of appeals first held that Section 2306(c) withstands due process scrutiny. It stated that the fee freeze is a rational and legitimate method for Congress to reduce the government's expenditures on Medicare while preventing non-participating physicians from shifting the resulting burdens to elderly Medicare beneficiaries (Pet. App. 14a-17a). The court also observed that the fee freeze is a temporary measure, enacted to protect Medicare beneficiaries from hardships pending the preparation of a more comprehensive program (*id.* at 17a-18a). The court rejected petitioner's argument that Section 2306 constitutes a bill of attainder, concluding that its provisions do not result in legislative punishment, that Congress did not intend to punish non-participating doctors, and that there are legitimate non-punitive purposes for the legislation (Pet. App. 22a-26a).

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[2]Subsequent legislation extended the physician fee freeze through March 14, 1986 (Pet. App. 7a n.3). The Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, § 9301, 100 Stat. 184, continued the freeze for non-participating physicians through December 31, 1986. That Act authorized an increase in the "customary" and "prevailing" rates, effective April 30, 1986, for participating physicians. Congress at the same time gave non-participating physicians a renewed opportunity to become participating physicians. *Ibid.*

3. The decision of the court of appeals is correct and does not conflict with any decision of this Court or another court of appeals.[3] There are no special or important reasons justifying this Court's review.

a. Petitioners' due process challenge to the constitutionality of Section 2306 is plainly infirm. Petitioners' treatment of Medicare patients is entirely voluntary. Congress does not require physicians to treat Medicare patients and Congress has not limited the fees that physicians may charge non-Medicare patients. If petitioners are dissatisfied with the Medicare program's reimbursement conditions, and, in particular, with provisions designed to protect elderly Medicare patients from increased health care costs, they are free to limit their practice to non-Medicare patients.[4]

Even apart from the voluntary nature of their Medicare activities, petitioners have failed to demonstrate a violation of due process. Social or economic legislation satisfies substantive due process requirements provided that it is not " 'arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt.' " *In re Permian Basin Area Rate Cases*, 390 U.S. 747, 769-770 (1968) (quoting *Nebbia* v. *New York*, 291 U.S. 502, 539 (1934)). Petitioners' claims fall far short of that standard. As the court of appeals observed (Pet. App. 16a), Section 2306's freeze on the fees charged by non-participating physicians represents

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[3]The courts have heard challenges to the constitutionality of Section 2306 on two other occasions and have upheld its validity in both instances. See *Private Medical Care Found., Inc.* v. *Bowen*, No. CIV-84-2275-W (W.D. Okla. May 30, 1986); *American Medical Ass'n* v. *Heckler*, 606 F.Supp. 1422 (S.D. Ind. 1985).

[4]Cf. *Bowles* v. *Willingham*, 321 U.S. 503, 517-518 (1944); *Minnesota Ass'n of Health Care Facilities, Inc.* v. *Minnesota Dep't of Public Welfare*, 742 F.2d 442, 446 (8th Cir. 1984), cert. denied, 469 U.S. 1215 (1985).

a reasonable method of fulfilling a legitimate legislative goal. The freeze was carefully formulated to reduce the Medicare expenditures without burdening Medicare beneficiaries.

Unlike participating physicians, who limit their fees to Medicare-determined "reasonable" charges, non-participating physicians—absent the fee freeze—could charge Medicare recipients any amount they wished. The Medicare patient would be forced to pay the full amount, subject to reimbursement from Medicare for 80% of the fee that Medicare determines is reasonable. Medicare patients, typically elderly persons on a fixed income, are ill-equipped to respond to rapid increases in health care costs. The fee freeze shields them from increased out-of-pocket costs resulting from increased charges by non-participating physicians.

Non-participating physicians continue to receive a reasonable fee based on the physician's charges for similar services in the quarter immediately preceding the freeze.[5] In addition, the freeze is a temporary measure that maintains the status quo while Congress conducts a more comprehensive examination of the Medicare program.[6] Furthermore,

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[5]Petitioners argue (Pet. 24) that the freeze is arbitrary because it penalizes physicians who in the past have kept their fees low, but now would like to raise them. But there is no reason to believe that the physicians' past rates were not set at fully remunerative levels. And there is nothing in the record of this case to support petitioners' claim that they have "scrupulously kept their fees low" (*ibid.*). As the court of appeals noted (Pet. App. 17a), Congress intended the freeze to work in concert with the efforts of the American Medical Association and individual medical societies that have urged their members to freeze their fees voluntarily.

[6]As the court of appeals stated (Pet. App. 18a), "Congress could reasonably determine that a temporary fee freeze, pending the preparation of a more comprehensive program, was necessary in order to prevent Medicare beneficiaries from bearing the burden of the reduction in Medicare expenditures."

physicians who object to the freeze retain the option of becoming participating physicians and limiting their charges to the Medicare-determined reasonable fee.[7] Under these circumstances, there is no serious doubt that Section 2306 satisfies due process requirements.

b. Petitioners' contention that Section 2306 constitutes a bill of attainder is frivolous. As the court of appeals held (Pet. App. 22a-26a), the provision does not inflict legislative punishment at all. Rather, it furthers the non-punitive legislative purposes of encouraging physicians to become participating physicians in the direct payment program and of prohibiting physicians from shifting increased costs to Medicare beneficiaries. Congress has the undoubted power to require that Medicare patients seek treatment from physicians who will comply with the Medicare reimbursement scheme. Similarly, Congress can take reasonable steps to encourage physicians to participate in the direct payment program and to encourage Medicare patients to seek treatment by participating physicians. And plainly, statutory provisions that merely establish administrative penalties for noncompliance with regulatory requirements do not constitute a bill of attainder.[8]

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[7]Petitioners argue (Pet. 23-24) that if Congress is going to regulate physicians' fees, it must create a regulatory board, commission, or body to set standards in such a way that all physicians can earn sufficient income. But there is no such constitutional requirement. *Bowles* v. *Willingham*, 321 U.S. at 516-517, 519. Cf. *Andrus* v. *Allard*, 444 U.S. 51, 68 n.25 (1979); *Exxon Corp.* v. *Governor of Maryland*, 437 U.S. 117, 124 (1978); *Bi-Metallic Investment Co.* v. *State Board of Equalization*, 239 U.S. 441, 445 (1915).

[8]Notably, Congress has provided that money collected as civil penalties may be used to pay restitution to beneficiaries who were overcharged (42 U.S.C. (Supp. II) 1395u(j)(4)).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General

JULY 1986

DOJ-1986-07